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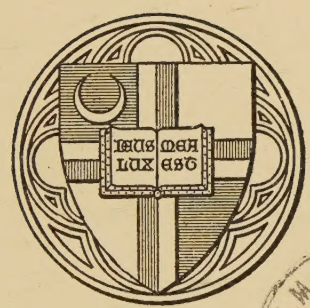

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THE FUTURE OF AMERICAN LAW*

IN the Psalm *De Profundis,* as it stands in the Vulgate, differing from the text with which we are familiar in King James's version, the psalmist cries out, in a noble passage, *propter legem tuam sustinui te Domine*—because of thy law have I abided thee, O Lord. The regularity of the operations of nature, as compared with the wilfulness and inconstancy of human behavior; the steadfastness and predictability of the moral order, as compared with the want of principle and untrustworthiness of the ungodly, gave strength to the faith of the psalmist in an Eternal who makes for righteousness—in an Eternal who stands behind the regularity and certainty of the natural and the moral orders. How to promote and maintain such regularity and certainty in human behavior, through morals or religion or education or government, has been a chief concern of humanity. How to promote and maintain them by the ordering of relations and adjustment of conflicting interests and determining of disputes has been the chief concern of organized humanity. Moreover, not the least part of that concern has been to insure regularity and certainty in the processes of ordering, adjusting, and determining. When one reflects on what has been done in the development of order and system in these processes, and weighs against the abuses incident to the political order the gains which that order and system have brought us, he may well paraphrase the psalmist and say: Because of thy law am I content with thee, O state.

* Lecture delivered at The Catholic University of America, School of Law, May 31, 1946.

When Aristotle wrote of man that he was a political animal, he put the emphasis on the adjective where the psychological thinker of today would put it on the noun. He thought of a government of laws (for that idea like so many others in politics and jurisprudence goes back to his writings) as the natural, i.e., the ideal, government. Ordering of conduct and adjustment of relations according to law and a separation or distribution of the powers of government, whereby a legal check is imposed on authority, seemed to him the significant things; where the realist of today sees only a pulling and hauling of conflicting desires rationalized by traditional formulas. Today order in the ordering, system in the adjustment, of relations, and checks upon authority operating in accordance with principles logically applied, are under suspicion everywhere. A group of jurists which is most heard from denies them reality. Nor do history and experience formulated in legal precepts appeal to these realists as more than illusion. Although in political and juristic thought the nineteenth century is characteristically the century of history, the later eighteenth and the nineteenth century are marked by increasingly rapid development of the physical sciences. In the nineteenth century these sciences become more and more specialized and differentiated and are increasingly behind a growing industry which in turn stimulates research and invention and so furthers the growth of the sciences. Toward the end of the last century the increased importance of the physical sciences for civilization has its influence upon political and juristic thought, and in the present century modes of thinking derived from, or devised on, the analogy of those sciences have been undermining what had been held to be the foundations of jurisprudence.

There is a clear gain for all thought in the habits of close observation of phenomena and subjection of theories to the test of such observation which the physical sciences have been teaching us. But the assumption that all our organized bodies of knowledge must be remade to the methods of the physical sciences, which the hegemony of those sciences in the pres-

ent has made fashionable, is as ill taken as the assumption that the physical sciences might be laid out *a priori,* which prevailed in the hegemony of metaphysics.

If in the era of faith in reason we took it for granted too lightly that human conduct might be subjected to rational principles, and adjustment of human relations might be carried on by rationally conceived formulas, yet the teachings of contemporary psychology, so far from undermining the work of ages of legal development, serve to show us how great has been the achievement of law and politics, by which the fundamentally unrational has been tamed to reason and law and order, and thus the research and experimentation and investigation which have given us the modern physical sciences have been made possible. It is not an accident that jurisprudence and ethics and politics grew up and reached what may prove their maximum before there was much development of the physical sciences. The latter, indeed, could not have arisen nor gone far had it not been for the stability and security brought about and maintained by the former. If not so striking to the eye at first glance, the subjection of human behavior to the exigencies of civilized life by ordered application of the force of politically organized society which has developed in the western world since the chaos of the earlier Middle Ages, is quite as significant as anything which has been done in the same time toward the harnessing of external nature to man's use.

Yet we have economic determinists and psychologists and positivists and realists with us in increasing number, with mouths speaking great things and challenging the significance and reality of what we had taken to be the chief agency in this harnessing of internal nature to the tasks of civilization; if not, indeed, challenging the reality or the effectiveness of that harnessing itself. Moreover, they challenge the rational and historical methods on which we had built our faith in the last century. However content we may be with what we have taken to be our achievements, jurists must cast about how to meet these challenges. They must ask what is to be the future of law, especially what is to be its future in an age

of machinery and of physical sciences. Furthermore, the American lawyer must ask what is to be the future of the law which has grown up in this country in five generations of independent legal development.

A philosopher of the last generation, writing on the nature of existence, felt bound to devote a preliminary chapter to the question, "Does anything exist?" In an age of skepticism and hard-boiled realism, one who considers the future of American law must first ask whether there is an American law, and if so what it is.

Nor is such a question so easy of answer. The materials of an Anglo-American law library are increasingly heterogeneous. Legislation is departing in every different way in every different jurisdiction from what were common rules or common dogmas for the English-speaking world. New types of question, arising in different jurisdictions, are receiving different judicial answers. There is not a little judicial experimenting with some subjects which the last century had taken to be settled. Administration is taking whole provinces of justice out of the purview of adjudication and is increasingly restive under judicial attempts to subject its actions to the measure of legal principles or the scrutiny of courts. Yet, when we examine these phenomena more closely, we do seem to see something universal, permanent, enduring, behind them; something binding our administration of justice to that of England and Ireland and Canada and Australia; something binding our administration of justice not merely to that of Blackstone's time, not merely to the classical common-law era, the time of Sir Edward Coke, but even to the mediæval English law. We seem to find something which gives form and consistency to the legislation which pours forth biennially or even annually from the lawmaking bodies of a federal government and forty-eight states. We seem to find something which gives consistency and unity to the mass of decisions coming forth from forty-eight Supreme Courts, each with full authority to declare the common law, from the federal Supreme Court and nine Circuit Courts of Appeals, and

from the courts of England and Ireland and Canada and Australia. Most of all, there is indubitably something which enables English and Irish and American and Canadian and Australian lawyers to read each other's books and understand each other's arguments and apply each other's judicial decisions and adapt each other's legislation as surely as they are unable to understand the arguments and read effectively the books and apply the authoritative texts of the non-English-speaking world. This something we call the common law. What is it?

In the last century, an era of assured knowledge, when men had few doubts about most things, and a philosopher could even write a chapter on the unknowable indicating that he knew all about it, jurists were debating and were far from agreed as to the nature of law. Today they are even less agreed. But for the lawyer's needs three things get the name of law, which for practical purposes we are not called on to seek to unify, namely, (1) the legal order, (2) the body of authoritative materials of judicial determination—the body of received materials in which those who decide cases are held and hold themselves bound to find the grounds of decision—and (3) what Mr. Justice Cardozo has happily styled the judicial process—the process of determining controversies in accordance, so far as may be, with the authoritative materials for decision. When we speak of the common law as a system we use the term "law" in the second of these senses. But in not infrequent usage we have in mind both the second and the third. What, then, is a system of law?

Much of recent thinking about law ignores what Maitland calls the toughness of a taught tradition. A system of law is essentially a taught tradition of ideals, method, doctrines, and principles, continuous as long as the course of teaching remains unbroken. The common law is a system of this sort, a tradition of taught law, continuous in England from the establishment of an organized teaching in the Inns of Court to the decay of that teaching in the sixteenth and seventeenth centuries, and then, as remade in the age of Coke, continuous

in the several lands of the English-speaking world from the seventeenth century. Sir Henry Maine speaks of the peoples who are ruled by the civil law as having "built the debris of the Roman law into their walls!" But it is more than the debris of Roman rules of law that binds together the laws of France and Italy and Spain and Latin America, on the one hand, and the legal thinking and technique and doctrine of Central Europe on the other. It is more than the debris of the rules of medieval English land law and medieval English procedure that binds together the laws of England and Ireland and the English-speaking British dominions and the United States.

Law as we understand it in the modern world has been a taught tradition into which teachers fitted legislation and the results of judicial or professional empiricism from the time when the first plebeian Pontifex Maximus began to give consultations in public so that students could attend and take notes. Out of this beginning of teaching grew the traditional teaching of the schools of jurists in the earlier empire. Out of that in turn grew the teaching of the ecumenical doctors in the Eastern empire in the fifth century. From this there is a link with law teaching at Ravenna in the earlier Middle Ages, and thence with the teaching at Bologna in the twelfth century. From the latter there is a continuous tradition of teaching to the present wherever throughout the world the modern Roman law prevails. In the same way, a tradition of teaching from the pleaders of the beginnings of English law in the King's courts, attested by the name apprentice which belonged to the junior bar down to the age of Coke, became a tradition of teaching in the Inns of Court, and, when that decayed, a tradition of teaching by lawyers who had pupils in their chambers. Thence in America it was carried on by lawyers trained in the Inns of Court, by their pupils in independent America as lawyers training pupils in their offices, by schools which grew out of expanded law offices, and finally by academic law schools which gradually replaced those of the apprentice type.

Note the general lines of such a development through teaching. With the rise of professional lawyers distinctions come to be drawn between the often oracularly expressed rules of primitive codes in the endeavor to give each rule more precise definition. Then cases begin to be distinguished as to those coming within and those without particular rules. Presently principles come to be put behind the distinctions and for convenience of teaching and learning are put in the form of maxims. Soon these principles become the basis of further distinctions and thus become starting points for legal reasoning. At this point teaching begins to make itself felt in the working out of broad doctrines to unify the principles, and the teacher's ideal of a body of logically interdependent precepts, born of the exigencies of instruction, begins to organize the received precepts in order to make them teachable, and so begins to make them more easy to find and to apply. Thus a tradition of organization of the law through principles and doctrines arises and makes for certainty of application, taking care of the need for stability, as the professional and judicial application to concrete cases makes for a continual unsettling of the details of the teacher's logical organization and overhauling of the doctrines and so takes care of the need for change. As the two correct each other a system of law grows up and achieves and maintains a balance between the general security, which calls for stability, and the individual life, which demands change. So long as the balance between the teacher and the practitioner is preserved, the taught system, into which legislation and new institutions and adaptations from without and novel adjudications are carefully fitted, becomes a powerful instrument for making a body of legal precepts effective for its purposes.

It is not, then, any body of fixed rules established at any fixed time or by any determinate authority, it is not any body of authoritative permanent or universal premises for legal reasoning, it is not any body of legal institutions, which we may believe is to have a long and distinguished future as an

agency of justice among English-speaking peoples. It is rather a taught tradition of the place of adjudication in the polity of a self-governing people. It is rather a taught tradition of voluntary subjection of authority and power to reason whether evidenced by medieval charters or by immemorial custom or by the covenant of a sovereign people to rule according to declared principles of right and justice. It is rather a tradition in which judging holds the chief place, not administering. It is rather a traditional technique of finding the grounds of deciding controversies by applying to them principles drawn from recorded judicial experience.

From one standpoint we may think of American law as a system—as an organized body of doctrines and principles, and even to some extent still of rules for the adjustment of relations and ordering of conduct. From another standpoint we may think of it as a tradition—either as a tradition of deciding, so far as tribunals are free to decide, or as a tradition of teaching and writing. From yet another standpoint we may think of it as a frame of mind—as the frame of mind, or perhaps better as a manifestation of the frame of mind, of a masterful people which has made its way in every quarter of the earth and yet has always imposed upon itself limitations of free action while still seeking to be free through requiring reasoned adherence to principles on the part of those who wield governmental authority over it.

In speaking of American law as a system, I have spoken in terms of a system of authoritative grounds of decision which yield precepts for adjustment of relations and ordering of conduct. I am not unaware that for the moment it is more fashionable to speak of law as a body of predictions or as a body of threats. But I submit that the law is not made up of predictions. Instead it is made up of bases of prediction. Moreover, what from the standpoint of one seeking advice as to the conduct of an enterprise may be regarded as a body of threats, from the standpoint of the judge is a body of precepts for decision getting its aspect of threat from the assured con-

viction that the several precepts will be applied to causes as they arise and so entail inconvenient consequences upon those who ignore them.

Thinking of it first in its aspect of a body of precepts, we must hasten to repudiate a conception of law as an aggregate of rules, i. e., of precepts attaching definite detailed legal consequences to definite detailed states of fact. This conception of law, derived from the Byzantine Roman law, in which precepts of the traditional law had been given legislative authority or put in legislative form, so that there seemed to be an aggregate of pronouncements of the will of the emperor, was given currency for the modern world by the law teaching in the Italian universities and the academic theory that the Corpus Juris was binding legislation for an empire embracing all Christendom and continuous with that of Constantine and Justinian. Accordingly, each text of the Digest was designated as a *lex*. Bentham, writing from the standpoint of the legislative reform movement of the nineteenth century, thought of statute as the type of legal precept, and his pronouncement that law was an aggregate of laws, and his conception of a law as a rule of law, became established in English analytical jurisprudence. One need spend no time upon Fortescue's doctrine of the continuity of such an aggregate of rules in England from pre-Roman Britain; a doctrine repeated by Hale and taken up by Blackstone, from whom it was often accepted in panegyrics of our law in the last century. Even in a reasonably modified form it is not easy to maintain a doctrine of identity or continuity of rules of law for the common-law world. Even in the most stable part of the law, the law of real property, legislation in England and legislation in our states have gone different ways and have done away with the unity that existed from Blackstone's time to the last generation. One need only pick up a volume of Canadian reports or Australian reports or English reports or reports of different states of the Union in order to see that the actual precepts by which justice is administered differ notably as

one goes from place to place. Diversity of geographical conditions, diversity of economic conditions, diversity of social conditions, lead to palpable diversities in the legal precepts which obtain in the different English-speaking jurisdictions. Moreover, when we look back over our legal history, we cannot but be struck with the relatively short life of rules of law, i. e., of legal precepts affixing definite detailed consequences to definite detailed states of fact.

This conception of law as an aggregate of rules of law and the extreme nationalism which grew up after the first World War have led many jurists of Continental Europe to write and speak as if there were no longer such a thing as the civil law; as if there were now only the law of France, the law of Germany, the law of Italy, and so on. But one who thinks of law as something more significant than a body of rules obtaining for the time being and looks beneath the surface of this nationalism cannot but see a real unity of spirit and technique and doctrine; he cannot fail to see that the tradition coming down from the Italian universities is still effective in enabling the lawyers of those lands to understand each other and use each other's texts and develop each other's ideas. There is, in this sense, still a civil law and a world of the modern Roman law.

A somewhat better case can be made for finding unity and continuity in certain principles. And yet when we come to look for a fund of common principles differentiating the common law from the civil law, tying the law of America today to that of England in the time of Coke and to the law of England, Ireland, and Canada, and Australia today, we shall find them very elusive. A few fundamental ideas of justice are common to civilized peoples. A small body of axioms of justice we share with the civil law. But more than one supposedly fundamental principle by which we set much store in the last century can be traced to a beginning in the text books of that time, was never universally true in the law of English-speaking lands, and is rejected or in course of rejection today.

More may be said for finding unity and continuity in legal institutions. It may be said that there are certain peculiar common-law institutions which mark our system in contrast to the civil law and are to be found wherever the English law has spread. One thinks at once of the doctrine of precedents, of the supremacy of the law, and of trial by jury. I shall have to speak of the supremacy of law in a moment in another connection. As to the doctrine of precedents, it has been relaxing in more than one American court within the memory of those now at the bar. Our practice by no means gives the weight everywhere to a single decision which the books of the last century claimed for it. Moreover, whatever the theory of the civilians, in practice, as recent Continental treatises have come to admit, the course of decision of the courts has come to be a form of the law almost everywhere. As to trial by jury, the civil jury is now little used in England and there are clear signs that it is moribund in this country. Even the criminal jury is under attack, and legislation modifying it is urged in more than one state. Perhaps the abiding universal common-law institution is that mode of trial of cases as a whole which has grown out of the exigencies of jury trial. But such was the Roman mode of trial, and the needs of causes involving expert evidence as well as the practice of administrative tribunals have been pushing us in more than one connection in the direction of inquisitorial rather than controversial procedure.

One institution, however, has proved universal and significant in the polity of the English-speaking world, namely, the common-law judge. In the Roman empire and in the tradition of the civil law the judge is a part of the administrative hierarchy. At common law he is independent. He wields the royal authority to do justice. He is not accountable to administrative superiors. In the words attributed by Coke to Bracton, he decides under God and the law. His independence is guaranteed by great constitutional documents or by express constitutional provisions everywhere. Through-

out the English-speaking world we have conserved the common-law authority of the courts and the common-law conception of the judicial office as to finding and declaring the law.

Characteristic ideas and doctrines and a characteristic technique are more significant. For one thing, there is the idea of relation. I have spoken of this in detail on other occasions. It is enough here to remind you of the constantly recurring double titles in our digests: principal and agent, parent and child, husband and wife, guardian and ward, landlord and tenant, master and servant, principal and surety, vendor and purchaser. No amount of systematic borrowings by our teachers from the civilians has availed to supplant law of domestic relations by family law, nor these traditional relational titles by conceptual ones such as agency, guardianship, suretyship, or sale. These double titles have a significance reaching far deeper than mere vocabulary. From the beginning common-law courts have been solving legal problems in terms of relation. They have made postulated relations the starting points of reasoning with respect to men not in relations. They have even sought for, and one might say conjured up, relations where none existed. As the chief systematic idea of the modern civilian is that of legal transaction (*acte juridique, Rechtsgeschäft*), the chief systematic idea of the common-law lawyer is relation. Where the nineteenth-century civilian sought for the will of the parties as deducible from what they did, the common-law lawyer and judge have sought to discover and enforce the duties and liabilities fairly incident to the relations in which the parties find or have put themselves. It is not too much to say that this idea of relation is the central one in the common law.

Along with the idea of relation, and like that idea an inheritance from the Middle Ages, is the mode of thought and ideal behind the doctrine of the supremacy of the law. The change wrought in England by the Revolution of 1688 and the resulting overshadowing authority of Parliament greatly narrowed the scope of that doctrine from what it was in the

hands of the judges in the fifteenth century who held a statute infringing the fundamental medieval distribution of powers between the spiritual and the temporal "impertinent to be observed," or in the hands of Coke and his brethren in the seventeenth century. In America we maintained the medieval idea of distinct spheres of authority and developed it to its logical conclusions. In the medieval English polity there was the sphere of the King's courts, the sphere of the ecclesiastical courts, the sphere of the sea law. There was the sphere of royal competence, the sphere of parliamentary competence, the sphere of judicial competence. In each case the sphere was thought of as defined by law, and the limits of the sphere were a matter of law. Hence in this country, where we have kept to the older English polity in this respect, political questions are largely legal and so in some sense legal questions become political. But if the legislative supremacy brought into English polity in 1688 has precluded a universal development of the supremacy of law in its details and consequences, the idea behind it, the idea, to use the phrase which Coke made classical, of ruling under God and the law, pervades the polity of half of the world in a common-law conception of administration and adjudication. There are those today who would think of everything which is done officially as law. Such is not the common-law teaching. Not administration as law but the requiring of administration to conform to rule and form and reason is the common-law ideal. We do not think of administration as parallel with law, but as a process under law. From the time when an English court of the fourteenth century refused to allow a collector of the fifteenths for the King to distrain the cattle of a subject without a warrant under seal, Englishmen and their descendants and those who have cast their lots with them have insisted that administration was under and part of the legal order and so under the body of authoritative precepts and standards governing all human action. They have insisted that the political order is not outside of the legal order and above

it, but rather that it is the political side of the legal order, or the legal order seen from the political side. The antithesis of their doctrine is the proposition recently maintained by jurists of Soviet Russia, that in the socialist state there can be no law but only administrative ordinances and orders.

No less characteristic and universal in the common-law world is our technique of decision, our technique of finding the grounds of decision in the authoritative legal materials, of shaping legal precepts to meet new situations, of developing principles to meet new cases, and of working out from the whole body of authoritative materials the precepts appropriate to a concrete situation here and now. The civilian is at his best in interpreting, developing, and applying written texts. From the time that the Law of Citations gave legislative authority to the writings of the great jurisconsults, he has thought of the form of the law as typically that of a code, ancient or modern. His method has been one of logical development and logical exposition of supposedly universal enacted propositions. His whole tradition is one of the logical handling of written texts.

In contrast the common-law lawyer is at his worst when confronted with a legislative text. His technique is one of developing and applying judicial experience. It is a technique of finding the grounds of decision in the reported cases. It is a technique of shaping and reshaping principles drawn from recorded judicial decisions. Hence while to the civilian the oracles of the law are academic teachers, the books of authority are codes, and the text books are commentaries upon codes, to the common-law lawyer the oracles are not teachers but judges, the books of authority are reports of adjudicated cases, and the text books are treatises on subjects of the law developed through comparison and analysis of recorded judicial experience.

If we think of the common law as a taught tradition of decision, it is a tradition of applying judicial experience to the decision of controversies. If we think of it as a tradition of

teaching and writing, it is one of teaching a systematic application of this technique and writing systematic expositions of the results of its application. Moreover, it is a tradition which has its roots in the Middle Ages and so was shaped in its beginnings as a quest for reconciling authority with reason, imposed rule with customs of human conduct, and so the universal with the concrete.

I have spoken of the common law, in the sense of the universal and enduring element in the law of the different English-speaking peoples, as from one point of view a frame of mind. For behind the characteristic doctrines and ideas and technique of the common-law lawyer there is a significant frame of mind. It is a frame of mind which habitually looks at things in the concrete, not in the abstract; which puts its faith in experience rather than in abstractions. It is a frame of mind which prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of seeking to refer everything back to supposed universals. It is a frame of mind which is not ambitious to deduce the decision for the case in hand from a proposition formulated universally, as like as not by one who had never conceived of the problem by which the tribunal is confronted. It is the frame of mind behind the sure-footed Anglo-Saxon habit of dealing with things as they arise instead of anticipating them by abstract universal formulas. It is noteworthy that there are signs of a movement toward this concrete mode of thought in recent juristic writing on the Continent.

We must not be blind to the attacks upon our law, as I have sought to describe it, which are going on aggressively and persistently in the United States, but are only a phase of a general attack upon law throughout the world. An era which rejects history is scornful of anything which has its roots in the Middle Ages. In this spirit many who accept the idea of law as an aggregate of rules of law assume that historical continuity means the continuous existence and appli-

cation by the courts today of a body of rules established in the Middle Ages. An era of hurry, turning to administration in order to get things done in a rush in advance of thorough consideration, is troubled because the common-law world had no public law till the latter part of the nineteenth—one might almost say, till the twentieth century. Many today lament that the attempt of Bacon and the Crown lawyers to set up an alien public law in the seventeenth century failed completely. Also in the United States the realists, and on the Continent a type of nationalist and believers in a totalitarian polity consider the idea of a state ruling according to law and not according to will as superstitious or as decadent. They scoff at the idea of a people solemnly covenanting by constitution or bill of rights to keep to announced principles of right and justice and to reason, and striving by continued adherence to judicial construction of their covenant to make it real in their political behavior.

But a tradition with its roots in the Middle Ages is not without advantages in the society of today where we seem to be moving toward something very like a new feudalism, and as to the need of a public law, something quite unknown to the received common law, we in the United States have done much to develop one on common-law lines and with common-law materials. Nor is it by any means assured that absolutist ideas and institutions will prevail in English-speaking lands in the twentieth century any more than they succeeded in prevailing in seventeenth-century England. There has been a long succession of attacks upon our legal tradition. In the sixteenth and seventeenth centuries there was a movement to supersede it by a public law on Romanist lines, conceived in terms of centralized absolute royal authority and administrative supremacy. In the seventeenth and eighteenth centuries there was a movement to supersede it by formulated reason, rejecting reported judicial experience and seeking to make a new system out of whole cloth. There was a like movement in early nineteenth-century America. Later in

the same century there was a movement to supersede the common-law tradition by the system and refined academic conceptions of the modern Roman law. At the same time, from another side, there was a tendency to supersede the tradition by local legislation and a cult of aberrant local decision. For a season the ideal of a local law, now definitely given up as a result of the economic unification of the whole land, was promoted by the decadence of professional organization, professional education, and qualifications for admission which obtained in the United States in the second and third quarters of the nineteenth century. Again, in twentieth-century America there have been two movements to supersede the tradition, the one by setting up administrative tribunals and agencies with increasingly wide jurisdiction over all manner of activities and relations, as free as possible from judicial review or control, and the other by popular control of decisions, either by recall of judges, replacing those who held to the law by those who would reject it or make of it a body of empty exhortations, or by review of decisions at a popular election, substituting the political expediency of the moment for the reasoned development of principles derived from experience.

No phenomenon of our political or social history is more marked than the vitality of the common-law tradition in the face of these movements. Indeed, persistence and vitality have characterized it since the Middle Ages. Note its vitality as against the reception of Roman law in the sixteenth century; as against the tendency to political absolutism in the seventeenth and eighteenth centuries—in the contest between courts and crown in seventeenth-century England and between lawyers and colonial governors and between colonists and the crown in eighteenth-century America. Note its vitality as against political hostility to things English after the American Revolution, as against the hostility to law and lawyers in the depression following that revolution, as against the competing French and Spanish law in the formative years

of many of our states, and in spite of the throwing of so many of our courts into politics and decline of professional training and lowering of standards of education and admission to practice which were incident to the rise of democracy after 1800. Note also its vitality as against the rise of the executive to leadership in our American polity in the twentieth century.

Note above all the vitality of the common-law idea of relation, which nineteenth-century jurists held archaic and stigmatized as feudal, and had sought to replace by Romanist conceptions, and the vitality of the common-law doctrine of the supremacy of the law even under attack from the strongest interests of the time. In truth, the idea of relation responds to what is now held to be the very nature of human society—not an aggregate of individuals but a complex of associations and relations whose inner order is the foundation of the law. Likewise, the idea behind the doctrine of the supremacy of the law responds to a deep-seated urge in human nature not to be subject to the arbitrary will of a fellow man. It expresses experience of the ill effects of repression which is sustained abundantly by the researches of modern psychology. These two features of the common-law tradition, expressing experience of life and experience of administering justice, have developed our private and public law respectively.

What is to take the place of the system of law we have developed in America on the lines of the common law? Some see a regime of individualized adjustment of relations and ordering of conduct at the discretion of magistrates or of administrative officials guided only by their intuitions of the public good. Some see a regime of administrative ordinances and orders assuming that the interest of some group or class is to be identified with the public good and that the demands of that group or class are to be satisfied by application of the force of politically organized society. Some urge a regime of concentration of power in which adjudication is

to have for its ultimate guide some organization or leader standing for politically organized society and wielding its authority.

Our American fundamental doctrine of the separation of powers is under heavy attack from those who urge that law is to be whatever is done officially. But the world has had not a little experience of late as to what rejection of that doctrine leads to. We were told under the Nazi regime that the separation of powers had disappeared from German public law. Russian writers tell us that the Soviet constitution "ignores the separation of powers." They tell us that rights are not protected by law when they run counter to official policy. They tell us that "law" has an absolutely new meaning. "It has no juristic rules, but only technical social rules." There are no questions of right and wrong but only techniques of ordering behavior. Law is not to be a guide to government, but an instrument of government. Reason gives way to force.

Some of them go further and give up the very name of law with its connotations of justice, and rights, and reason. One says: "Every conscious workman is aware that religion is the opiate of the people; but I believe that only a few realize also that law is an even more poisonous and disturbing opiate." Another says: "The Soviet state is not only extra-juristic, it is also anti-juristic." Instead of maintaining a caricature of law, these writers would throw over both the idea and the name.

Notwithstanding the downfall of two of the totalitarian states which carried to the extreme the idea of the will of the political leader as the measure of adjusting relations and ordering conduct, and required judges to adhere to official instructions as to particular cases, there are those who still actively preach the doctrine of what is done by officials under the direction of those above them in the governmental hierarchy as law. Naturally there are others who take this rejection of law seriously and assume to exercise power of par-

alyzing our economic life because they find themselves able to do it. There are others who would give up all distribution of powers and vest them as a whole in centralized agencies of government which in the end must call for a supreme omnicompetent head. There are quite enough who would do away with even the name of law.

We have seen something recently of what the abdication of law and leaving of our economic order at the mercy of highly organized groups and their leaders may bring us to. Certainly neither in our internal order nor in the order of international society has there been any experience to warrant faith in a world without law. If law is not to be abandoned, we may be confident that our American development of the common law will have a future comparable to what the Roman law achieved for western Europe after the twelfth century. For it is the spirit of English law of the seventeenth century, the spirit of its taught tradition, the spirit of its technique of decision, the frame of mind behind its conceptions of the relation of government and governed, and its doctrines as to adjudication and administration, shaping experience to the exigencies of diverse climes and mixed peoples of diverse stocks, which has enabled English law to divide the world not unequally with the Roman law. As the texts of the matured Roman law have been a quarry for lawyers and lawmakers and law teachers since the twelfth century, so we may confidently believe that the decisions of the common-law courts in the maturity of that system in the nineteenth century will be a quarry for English-speaking judges and lawyers and lawmakers and law teachers for generations to come.

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ENANTIOPHANES

ENANTIOPHANES is well known as the author of numerous scholia which have come down to us in Emperor Leo the Wise's Basilica. He gives cross-references and points to discrepancies or apparent contradictions in Justinian's codification. There is no doubt that his "name" was derived from the title of a book, περὶ ἐναντιοφανειῶν :[1] since the identity of its author was forgotten, a later generation made up a proper noun from the title and, with its characteristic delight in this kind of namesgiving, inscribed the scholia extracted from the book as Τοῦ Ἐναντιοφανείου, in full or by abbreviations.[2]

From Cujas to the present day scholars have attempted to identify the Enantiophanes. Zachariae von Lingenthal concluded in 1836 that he was one person with that other nameless Byzantine author, whom the scholia of the Basilica call "the Anonymus". This generally accepted identification is of some importance. The Anonymus had written a Greek *summa,* or epitome of the Digest and added to it, if we follow the hypothesis of H. Peters,[3] a *catena*: a marginal

[1] Without an examination of the MSS I am not able to evaluate the observation that at least two scholia taken from *Cod. Par. gr.* 1345 are introduced by the words τῶν ἐναντιοφανῶν (ed. G. E. Heimbach, *Basilicorum libri LX,* 6 vols., Lipsiae 1833-70, [= Heimb.] IV, 48, schol. Κρυίλλου pt. 2; cf. Heimbach, *Manuale* [= Heimb. VI, 217-434] *ad h.* l.) and by καί φησι τὸ τῶν ἐναντιοφανῶν βιβ. (Heimb. IV, 43, schol. τοὺς ἐξ ἀρρενογονίας). In accordance with this title, *Cod. Laur.* 80.11 gives at least four times (Heimb. III, 270 note *e;* 276 n. *d;* 284 n. *l;* 391 n. *p*) the inscription τῶν ἐναντιοφανῶν. It seems that this title was sometimes used instead of the more common one.

[2] In *Cod. Escor.* alone (Heimb. VI, 164-5) the form Τοῦ Ἐναντίου is found, as attested by both copies (*Cod. Haen.* and *Cod. Lugd. Batav.*). There is however, if the edition is correct, one characteristic exception, Heimb. I, 361: Τοῦ Ἐναντιοφανοῦς.

[3] Hans Peters, *Oströmische Digestenkommentare und die Entstehung der Digesten* (Berichte der Sächsischen Gesellsch. der Wiss. 1913). This book is not mentioned by Spulber (n. 6 *infra*), but cf. F. H. Lawson, *Law Quarterly Rev.* 47 (1931) 540ff.

"chain" composed from commentaries by previous authors and supplemented where necessary by the compiler's own *paragraphai,* which consisted of cross-references and some comments. According to Peters, the *catena* was completed about 600 A.D., not long after Justinian's death, and comprised the main achievements of the sixth-century commentators, integrated by the Anonymus' own remarks. *Summa* and *catena* were to form, after three hundred years, the core of the Basilica and of the scholia subsequently added thereto.[4] It is generally agreed, furthermore, that the Anonymus wrote a monograph, μονόβιβλος περὶ ληγάτων καὶ μόρτις καῦσα δωρεῶν, and the Nomocanon in XIV titles.[5]

I.

The literary profile of the first compiler of the *catena* would be altered if the book on *enantiophaneiai* were not written by him. We therefore have to examine a thesis put forward some years ago by C. A. Spulber, who attacked what seemed to be the established result of modern investigation, denied the authorship of the Anonymus, and asserted that of Stephanus who was probably the latter's teacher.[6] It is the purpose of the present paper to defend Zachariae's position and to support it by some new, though minor arguments.

(1) Spulber's only argument is taken from an observation by Heimbach,[7] who noticed that a scholion attributed to the

[4] The theory of Peters has been attacked since by H. J. Scheltema (*Revue d'histoire de droit* 16 [1939] 320 ff.) whose arguments, however, cannot convince me. I shall deal with this valuable essay in another place. See also n. 67 *infra.*

[5] On the significance of this author see also J. M. Sontis, *Die Digestensumme des Anonymos* (Heidelberger Rechtswissensch. Abhandl. 23, 1937) 143.

[6] "Qui fut Enantiophanès?", *Archives d'histoire du droit oriental* 1 (1937) 307-319.

[7] Spulber refers (315 n. 4) to Heimb. I, 259 and VI, 151. The first citation is mistaken and cannot be verified; certainly Heimb. I, 259 does not contain what Spulber quotes. But Heimb. VI, 221 (*Manuale*) has to be mentioned instead. Here Heimbach gives the text of Balsamon (cf. his note *f*) and refers it to the *index* (not, like Spulber, to a book on *enantiophaneiai*) of Stephanus.

Enantiophanes by the Basilica[8] is mentioned by Balsamon as a scholion of Stephanus. Theodorus Balsamon wrote his commentary on the Nomocanon of 883 at the end of the twelfth century.[9] Six hundred years separate his work from the *catena* of the Anonymus, and an even greater number of years, from Stephanus' commentary of the Digest. Commenting on *Nomoc.* i.3, Balsamon says:[10]

> Διδάσκει δὲ καὶ ὁ Στέφανος ἐν τῷ μβ' κεφ. διδασκαλίαν ἀρίστην, καὶ λύει τὰς περὶ ἀγράφου συνηθείας ἐναντιοφανείας, λέγων οὕτως. Ἡ χρονία συνήθεια τότε ὡς νόμος κρατεῖ, ὅτε μὴ ἐγγράφῳ διαμάχηται νόμῳ.

The second sentence, as Spulber rightly saw, is taken from the text itself of the Basilica, which in turn reproduces *Dig.* 1.3.33:

> Ulp. 1 de off. procons.: Diuturna consuetudo pro iure et lege in his quae non ex scripto descendunt observari solet; Heimb. I, 39: Ἡ μακρὰ συνήθεια ἀντὶ νόμου κρατεῖ, ἐν οἷς οὐκ ἔστιν ἔγγραφος (*Bas.* ii.1.42).

Balsamon's reference (ἐν τῷ μβ' κεφ.) suggests, and the wording of the quotation makes it all but certain that he wished to indicate here the solution of a discrepancy by the text, not by a scholion, of the Basilica. This is confirmed by the further observation that the continuation of Balsamon's scholion (which will be considered presently) is not related to this *enantiophaneia.*

Balsamon seems to have believed that Stephanus was the author of the passage under discussion. Perhaps he knew that the *summa* (ἔνδεξ) of Stephanus had often been used in composing the text of the Basilica. This fact was generally known.[11] The Byzantine scholars were accustomed to call

[8] Heimb. I, 39: *Bas.* ii. 1. 42.

[9] Zachariae von Lingenthal, *Griech. Nomokan.* (St. Petersburg 1877) 17; *Griechisch-römisches Recht* (1892) 37; Heimb. VI, 151.

[10] C. Voelli et H. Justelli *Biblioteca iur. can. vet.* (Paris 1661) II, 819 = Ralli et Potli, *Syntagma* (1852) I, 39 = I. B. Pitra, *Juris eccles. Graec. hist. et monum.* II (1868) 461.

[11] Lawson, *op. cit.*, 538; Spulber 314 n. 1.

Stephanus the *ἰνδικευτής*,[12] and as late as the fourteenth century, Blastares was aware that Stephanus had published the Digest *εἰς πλάτος*.[13] It does not matter that Balsamon this time was wrong in his assumption: we know of another instance in which he confused the text with the commentaries.[14]

Balsamon goes on to say:

> *καὶ μὴ νόμιζε τοῦτο ἐναντίον εἶναι τῷ τέλει τοῦ προλαβόντος διατάγματος. ἐκεῖ μὲν γὰρ περὶ συνηθείας λέγων φησί, ὅτι δύναται αὐτὴ νόμον ἀνελεῖν. ἐνταῦθα δὲ περὶ συνηθείας φησί καὶ λέγει .... Σημείωσαι οὖν τὴν τοιαύτην διδασκαλίαν ὡραίαν οὖσαν, καὶ ἐν ταῖς δικαστηρίοις συχνάζουσαν.*

This continuation tallies almost exactly with a scholion attributed to the Enantiophanes in *Cod. Coisl.* 151 of the Basilica:[15]

> *Τοῦ 'Εναντ'. 'Εναντίον εἶναι τοῦτο τῷ τέλει τοῦ προλαβόντος κεφαλαίου μὴ νόμιζε, ἐκεῖνο μὲν γὰρ περὶ ἀσυνηθείας λέγων φησίν, ὅτι δύναται αὕτη νόμον ἀνελεῖν . . . Σημείωσαι οὖν αὐτὸ ὡραῖον ὂν καὶ συχνάζον*

Does it really follow (as Spulber believes) that this second part of the interpretation belongs to Stephanus? Since here a discrepancy is solved (= schol. *Bas.* ii. 1.42) that has nothing to do with the one explained in the preceding part (from the text of *Bas.* ii. 1.42) of Balsamon's scholion, it is quite probable that this second part originally was a separate scholion, referring to the Enantiophanes, and that a copyist who by mistake omitted the inscription is responsible for the contamination. Mistakes of this kind occur frequently enough

[12] Heimb. VI, 128.

[13] Heimb. VI, 49.

[14] Heimb. VI, 116, who explains that by this erroneous identification Balsamon speaks of a renovation of the laws when he means only a renovation of the commentaries.

[15] *Bas.* ii. 1. 42: Heimb. I, 39.

in the Basilica themselves;[16] consequently we may expect them as well in Balsamon's commentary, which is largely derived from the Basilica—especially when we consider how often the latter had been copied, and thereby altered, in the three intervening centuries. And this consideration, which alone would suffice to weaken Spulber's argument, is more than a gratuitous conjecture: Heimbach has proved by a thorough analysis[17] that Balsamon in commenting on the Nomocanon of 883 read the Basilica in a recension different from that reconstituted in his (Heimbach's) own edition, which in itself shows an astonishing, though inevitable diversity.[18] It is therefore very likely that already in the exemplar used by Balsamon the text and the scholion of *Bas.* ii.1.42 were contaminated.

Spulber evidently felt how precarious it is to argue from one single remark by Balsamon and therefore referred to a second scholion of this author, likewise on *Nomoc.* 1.3, which reads:[19]

> Τὸ παρὸν ϛ' θέμα τοῦ μη' κεφ. τοῦ α' τιτ.τῆς β' βίβλου λύει τὴν ἐναντιοφανείαν, ἀκολούθως τῷ διαλεχθέντι κεφαλαίῳ, τῇ ἑρμηνείᾳ τοῦ Στεφάνου[20] καὶ τῷ νόμῳ τῷ λέγοντι πρὸς τὸ φιλανθρωπότερον τοὺς νόμους ἑρμηνεύεσθαι.

[16] This explanation is offered by Zachariae (*Anekdota* [1843] 205) and accepted by Spulber (p. 317) for other *schol. Bas.*: "sed aut additur huius (Enantiophanis) adnotationi locus ex Stephani commentario, qui separari ab illo debuisset aut Stephani allegatio per interpolationem a recentiori scholiasta factam adnotationi...Enantiophanis accessit."

[17] Heimb. VI, 111-115, esp. 114, left col.; 115, left col., 151-152.

[18] Since no copy of the Basilica is preserved which contains all the books, Heimbach's edition is based on numerous MSS of different character. It is indeed a most heterogeneous work (cf. Lawson, *Law Quart. Rev.* 46 [1930] 488 f.).

[19] In the edition of Voellus and Justellus (note 10) this scholion is given as the second part of schol. 1. But Ralli and Potli are probably right in distinguishing two separate scholia. Pitra does not reproduce schol. 2.

[20] Here the text ends in Spulber's quotation (p. 315). Also the text of schol. 1 actually begins before, and ends after the extract given by Spulber 313.

Does this scholion really prove that Stephanus was the author of the *enantiophaneiai?*[21] It does not speak of a work bearing this title but of a single "contradiction" which is solved by the text of the Basilica (κεφάλαιον), by an interpretation (ἑρμηνεία) of Stephanus, and by a legal principle. Certainly the *hermeneia* of Stephanus cannot be identified with the *enantiophaneiai,* regardless whether he or the Anonymus is considered the author of the latter. For this work does not "interpret" the text: it solves contradictions and collects cross-references. Unlike the *paragraphai* of Stephanus, it is never called a *hermeneia.*[22]

This second scholion by Balsamon does not refer to the discrepancy discussed in part two of schol. 1 (probably dervied from the Enantiophanes), but to part one (derived from the text of the Basilica, here attributed by Balsamon to Ste-

[21] Spulber 315: "il repète donc que l'auteur des Enantiophanies est Stephanos."

[22] Particularly clear in this respect is *Cod. Escor.*—the MS on which Heimbach based his edition of *Bas.* viii. Only at the beginning of the second *hermeneia* we read here Ἑρμηνεία τοῦ Ἐναντίου (Heimb. I, 324). But all the other *hermeneiai* belong to Stephanus (Heimb. *Man.*) and no scholion belonging to the Enantiophanes (eighteen in *Bas.* viii) is called a *hermeneia.* Moreover, *Cod. Par.* 1353, which contains the same scholion (Heimb. I, 358), does not attribute it to the Enantiophanes although other scholia of this MS (e. g. to §§ 5, 9: Heimb. I, 358) show his name. It seems probable that in *Cod Escor.* either Ἑρμηνεία or τοῦ Ἐναντίου were added erroneously by a copyist, since both form and contents of the scholion may fit Stephanus as well as the Enantiophanes. It is therefore not convincing when Spulber 315 n. 3 tries to prove by this scholion alone that the term *hermeneia* was applied, not only in its strict sense to the work of Stephanus, but also more loosely to Enantiophanes. He might at least have mentioned schol. Ἀνάγνωθι to *Dig.* 3.1.10 (Heimb. I, 332) which is inscribed τοῦ Ἐναντίου in *Cod. Lugd. Batav.* but shows Ἑρμηνεία τοῦ Ἐναντίου in *Cod. Haen.* Both MSS are copies of *Cod. Escor.* and it is difficult to decide which may have been the original wording in this lost MS. If we prefer, with Heimbach, the shorter reading of *Cod. Lugd. Batav.* it would follow that even modern copyists sometimes added the word *hermeneia,* so frequently found prefixed to scholia of *Bas.* viii. If the other reading is accepted we have to attribute the mistake to an ancient copyist—and then the same mistake must be assumed for schol. Heimb. I, 324. *Cod. Haen.* sometimes adds the word *hermeneia* also to scholia of Theodorus: Heimb. I, 334 n. *o;* 338 n. *h;* 339 n. *r;* 345 n. *k* (in this last one the copy cannot be correct: ἑρμηνεία Θαλελαίου: Θεωδώρου).

phanus.) Again, as in schol. 1, the legal text (*kephalaion*) and the interpretation of Stephanus (*hermeneia*) are mentioned side by side.[23]

I therefore suggest that schol. 1 of Balsamon contains two parts which were originally separate: one, attributed by Balsamon to Stephanus, the other, almost identical with the scholion assigned to the Enantiophanes in *Cod. Coisl.* 151. If this explanation is accepted, the only argument for identifying the Enantiophanes with Stephanus is eliminated.

(2) Even if our hypothesis were rejected, a serious question would remain: How does Spulber account for Balsamon's knowledge of the authorship of Stephanus and for his motive in replacing the name of the Enantiophanes by that of Stephanus? Spulber first suggests that Balsamon possessed or saw a manuscript of the *enantiophaneiai* which was signed by Stephanus. He has to admit, however, that this is rather unlikely[24] and therefore offers another explanation—indeed the only alternative—viz. that Balsamon took the scholion from the Basilica where he saw it assigned to the Enantiophanes; that from his studies he knew Stephanus to be the author; and that consequently he substituted this name to the one given in the Basilica.

But it is extremely improbable that Balsamon, and nobody else, should have had knowledge of this authorship of the *enantiophaneiai.* Whatever the reasons for which the identity of the writer was unknown to the men who added, probably in the seventh century, extracts from his book to the

[23] In both cases (but not in pt. 2 of schol. 1) it is said that "the discrepancy is solved" (*λύει τὰς . . . ἐναντιοφανείας, λύει τὴν ἐναντιοφανείαν*). Schol. 1 pt. 1, it is true, speaks of a *διδασκαλία ἀρίστη,* and pt. 2 of a *διδασκαλία ὡραία.* But this coincidence is less significant: both the text (Stephanus) and the scholion (Enant.?) may be called a *didaskalia.* Moreover, the original version of the scholion (Heimb. I, 39) does not use this term but has only *ὡραῖον.*

[24] Spulber 314, esp. nn. 2 and 3. If he had taken notice of Peters' theory (n. 3 supra) he would have seen that at the time of the Basilica the *Enantiophaneiai* were known no longer in the original but only from the additions to the *catena* of the Anonymus (Peters, *op. cit.,* 12; Lawson, *Law Quart. Rev.* 47, 547).

catena of the Anonymus and invented the curious name "Enantiophanes"—could anybody believe that his true name emerged five hundred years later? To be sure, the authority of Stephanus was great even at this late time.[25] But it does not follow that his original works were still to be found in the libraries of the twelfth century. And even if Balsamon positively knew that Stephanus was the author, it is hard to see what could have moved him to alter the inscription of a scholion contained in the Basilica. They were the imperial law of his day, and old scholia partook in the legal force of the compilation. Balsamon himself as quoted by Spulber[26] is the best witness for this. He says in the preface that he employed the old interpretations (*τὰς παλαιὰς ἑρμηνείας*) for solving apparent contradictions (*τὰ . . . δοκοῦντα ἐναντιοφανῆ ἐλύσαμεν*).[27] To him the wording of the scholia, and consequently the names of their authors, were sacrosanct. He was not allowed to replace the name of the Enantiophanes by that of Stephanus, only to make a show of his erudition.

The knowledge of Balsamon; the reason for the alteration; the justification of substituting another name—all this has not been explained by Spulber. Instead, he merely declares that a mistake on the part of Balsamon is impossible:[28] that he does not confound anything.[29] This would be a bold assertion even as regards the old commentators, let alone Balsamon. The literary habits of the epoch and the condition of our manuscripts do not guarantee accuracy. A hypothesis based on the accuracy of a single passage is therefore hazardous. It tumbles when we consider how easily the recension

[25] Spulber 315 n. 1; but instead of Heimbach, *De orig. Bas.* 142, Spulber should have cited Heimb. VI, 14 nn. 20-24 (where it may also be seen that Stephanus was mentioned elsewhere by Balsamon); cf. also Heimb. VI, 151 n. 1 (here the reference "T. I, p. 557" has to be corrected: II, 557).

[26] P. 315 f.

[27] Cf. Heimb. VI, 153.

[28] Spulber 314: "Dira-t-on que, peut-être, Balsamon se trompe? Impossible."

[29] 315: "...ne fait pas de confusions."

of the Basilica used by Balsamon, or the latter himself, or the copyist of his manuscript, could have made a mistake. Spulber himself has to admit that in our scholion Balsamon refers incorrectly to the text of the Basilica,[30] and at least one further instance of inexactness in citations can be easily added.[31] Moreover, the substance of this very scholion is inaccurate in the main point: the original scholion solves the discrepancy by explaining that one legal text is speaking of *consuetudo* (συνήθεια), the other, of dissuetudo (ἀσυνήθεια); but Balsamon has both times συνήθεια in the decisive passage [32] and thus confounds the whole argument. His untrustworthiness in other respects has been demonstrated by Heimbach.[33] And if Balsamon really believed, as Spulber supposes,[34] that Photius was the author of the Nomocanon in XIV titles, he was even mistaken about the origin of the very text on which he commented.[35]

The "infallibility" of Balsamon is therefore of little value. The only remaining argument—namely, that Stephanus liked to present contradictions and their solutions, and that he was

[30] 315 n. 2: "Au commencement du premier scolion (Ralli et Potli, op. c. 39), Balsamon cite le θέμα ς΄ comme appartenant au μα΄ κεφ. Ce sont probablement des erreurs de copiste. Il s'agit d'après le contenu du texte, des Bas. II, 1, 41 qui n'a qu'un seul θέμα." This statement is correct, except that the MS contains only θέμα ς΄ (not μα΄ κεφ.) whereas the Latin translation of Voell. et Just. gives "VI them. cap. XLI. tit. I. lib. II."

[31] The citation at the beginning of schol. 2 (n. 19 *supra*) does not mean *Bas.* ii.1.48.6, but again (cf. the previous note) *Bas.* ii.1.41. Yet, neither c.41 nor c.48 contain a *thema* 6.

[32] Spulber 314. The mistake is attested by both editions (Voell. et Just.; Ralli et Potli). For the original text of the Enantiophanes see at n. 15 *supra*. Of course the mistake may be due to a copyist as well as to Balsamon himself.

[33] Heimb. VI, 152: "Balsamonis testimonio de quodam iuris Iustiniani loco in Basilicis vel recepto vel omisso magnam fidem ... (non) ... haberi potuisse, cum haud discreverit, utrum praetermissio a Basilicorum architectis profecta, an incuriae et negligentiae eorum, qui codices descripserunt, tribuenda sit."

[34] P. 312.

[35] The Nomocanon of 883, on which Balsamon commented, is a revised edition of the Nomocanon of 629-640; it had meanwhile been re-edited once more, probably by Bestes, cf. Zachariae, *Griech.-röm. Recht* 12 f., 22, 34. Its author was not Photius but most probably the Anonymus, cf. II, 2 *infra*.

fond of antinomies [36]—does not prove much, for this is a quality common to all legal writers of this epoch.

(3) Spulber does not conceal the fact that one strong argument militates against his thesis: the Enantiophanes refers to Stephanus.[37] But he underrates the weight of this argument, which cannot be eliminated by merely assuming that Stephanus (under the name of Enantiophanes) is quoting himself as modern authors often do. Stephanus was the author of at least three books.[38] When an author of several works does refer in one place to another of his writings, he would not simply cite his own name without specifying the title of the work. But this is what the Enantiophanes does if we follow Spulber.[39] It is therefore indispensable to examine the references to Stephanus made by the Enantiophanes, particularly so because Spulber tries to eliminate two out of the three references discussed by him.

(a) schol. Τοῦ Ἐναντιοφανοῦς. *Στέφανός φησι, μετὰ λύσιν. . .* [40] Spulber has nothing to say against the evidence furnished by this quotation.

(b) schol. Τοῦ Ἐναντιοφανοῦς. *Ἀνάγνωθι. . .πρόσκειται ἐν τῷ πλάτει . . .λέγει ὁ Στέφανος. . .* [41] Zachariae doubted whether here the Enantiophanes is speaking. He suggested that originally a second scholion began where Stephanus is quoted and that this portion was possibly added by a later scholiast.[42] Heimbach

[36] P. 316.

[37] P. 317.

[38] The *summa* of the Digest, the *paragraphai* to this *summa,* and a commentary on the Code.

[39] It is quite another thing when Anonymus-Enantiophanes does not mention the particular work of Stephanus: for he refers of course, when quoting Stephanus, to extracts from the latter in his own (the Anonymus') *catena.*

[40] Heimb. III, 300 = Fabrot, *Bas.* IV, 431 (quoted already by Zachariae, *Anekd.* 205).

[41] Heimb. III, 363 = Fabr. IV, 566, schol. *f,* also quoted by Zachariae *loc. cit.*

[42] Zachariae, *Anekd.* 205 n. 38.

followed up this lead and found that indeed in *Cod. Laur.* 80.11 a new scholion begins with the words *πρόσκειται ἐν τῷ πλάτει*; he accordingly corrected the text of Fabrot.[43] Spulber mentions only the doubt voiced by Zachariae but not Heimbach's observation, which would have considerably improved his own argument. On the other hand, he then would have seen that Heimbach, although he established the second part as a separate scholion, nevertheless disagreed with Zachariae as to its authorship: he affirmed that it had been written by the same author as the first part, i. e., by Anonymus-Enantiophanes. His proof is based on the observation that the term *τὸ πλάτος* is employed as denoting the *index* (*summa*) of the Digest by Stephanus.[44] The use of this term seems indeed to be characteristic of Anonymus-Enantiophanes.[45] Three times it is found with the Enantiophanes, nineteen times with the Anonymus, but with nobody else among the old interpreters except Stephanus himself, who is here (*λέγει ὁ Στέφανος*) out of the question. Therefore the only logical conclusion for Spulber would have been that the quotation has to be attributed to the Anonymus instead of the Enantiophanes.

[43] Heimb. III, 363 note *y*; VI, 15 n. 38.

[44] Heimb. VI, 15 (16) n. 38; VI, 6, n. 30.

[45] Under present conditions it is not possible to examine all instances in which the term is found in the Basilica. The following revised survey is based on the scholia collected by Heimb. VI, 6 n. 30. Heimbach does not differentiate between the Anonymus and the Enantiophanes, but the distinction is needed for our present purpose. The term—mostly in the phrase *πρόσκειται ἐν τῷ πλάτει*—is used as follows: (1) twice by Stephanus himself: Heimb. IV, 265 and 272 (both scholia have no name prefixed but are assigned to Stephanus in Heimb. *Man.*); (2) three times by the Enantiophanes in scholia that bear his name: Heimb. II, 122; III, 410 and (addition mine) 370; (3) twice by the Anonymus in scholia showing his name: Heimb. II, 83; III, 362; (4) seventeen times in scholia attributed by the *Manuale* to the Anonymus, i. e., which in Heimbach's opinion may belong to either Anon. or Enant.: Heimb. I, 387; III, 211 (addition mine), 375; 379; 396; 400; 403; 414; 475; 476; 478 (twice); 737; IV, 9; 17; 197; 228; (5) three times only in scholia not attributed to this author: Heimb. I, 392; III, 205 (misprinted as II, 205 in Heimb. VI, 6 n. 30) and 212. One scholion belongs to Kalokyros (IV, 12) and therefore does not interest us here.

(c) schol. Τοῦ Ἐναντιοφανοῦς. . . (third sentence) φησὶν ὁ Στέφανος παραγραφόμενος. . .[46] Here Zachariae's doubts were not confirmed by Heimbach who evidently did not find two separate scholia in *Cod Laur.*[47] It therefore remains probable that the entire scholion, including the third sentence, belongs to the Enantiophanes.[48]

To these texts mentioned by Zachariae a fourth instance has to be added:

(d) schol. Μᾶλλον δὲ. . .καίτοι φησὶν ὁ Στέφανος ἑτέραν ἐπάγων διάστιξιν καθ' ὃ. . .ὅπερ οὐκ ἔχει λόγον . . .[49] In this scholion, transmitted by a good and old MS,[50] the Enantiophanes again refers to a *paragraphe* by Stephanus. It is impossible that the latter himself is speaking. For the speaker rather sharply criticizes what Stephanus said.

Thus we have at least two scholia (*a* and *d*) in which it is positively the Enantiophanes who quotes Stephanus; a third scholion (*c*) which probably belongs to him; and a fourth one (*b*) in which either the Enantiophanes or the Anonymus is speaking. Neither of the last two scholia can be attributed to a late writer. As their wording shows, it is in both cases not simply a matter of adding a passage from Stephanus.

Moreover, an examination of other scholia of the Basilica quoting Stephanus proves that almost all of them belong to Anonymus-Enantiophanes. Not less than twelve can be enumerated,[51] and the remaining one is probably by the

[46] Heimb. II, 448 (Spulber by mistake cites III, 448).

[47] Cf. *Manuale.*—I do not know why Heimb. VI, 15 n. 38 does not mention this scholion; perhaps because its second part refers to the Basilica (cf. note 52 *infra*).

[48] The *paragraphe* of Stephanus is contained in Heimb. II, 116, schol. 16.

[49] Heimb. III, 389 n. 1, referring to *Cod. Laur.* 80.11. Cf. Sontis, *op. cit.*, (n. 5 *supra*) 138.

[50] Heimb. VI, 169.

[51] (1) Heimb. II, 83: ἐν τῷ πλάτει οὕτως κεῖται . . . καὶ φησι πρὸς τοῦτο ἐν ταῖς παραγραφαῖς ὁ Στέφανος ταῦτα . . .; (2) III, 362 (or Enant.: Heimb. VI, 16 n. 38): πρόσκειται ἐν τῷ πλάτει . . . καὶ φησιν ὁ Στέφανος . . .; (3) III, 379: Τό πλάτος ἔχει

same author.[52] The close connection between the Anonymus and his teacher, Stephanus, has been long observed.[53] The latter's other pupils, Julianus and Theodorus,[54] did not comment on the Digest and had therefore no opportunity to refer to their master. The Anonymus, on the other hand, is often referring to Stephanus even where he does not mention the name.[55] Now, if only two authors—the Anonymus and the Enantiophanes—are found to quote Stephanus, and if in doing so they are also found to use both the same wording, the most convincing suggestion is that they are actually one author. Our scholia *b* and *c* are using the terminology (*πρόσκειται ἐν τῷ πλάτει . . .λέγει ὁ Στέφανος*, and *φησὶν ὁ Στέφανος παραγραφ-*

. . . καὶ φησι παραγραφόμενος ὁ Στέφανος . . .; (4) III, 396: *πρόσκειται ἐν τῷ πλάτει . . . καὶ ἑρμηνεύων τὸ ῥητὸν ὁ Στέφανος λέγει . . .*; (5) III, 400: *Τὸ πλάτος ἔχει . . . ἐξηγούμενος δὲ τὸ ῥητὸν ὁ Στέφανος λέγει . . .*; (6) III, 403: *Τὸ πλάτος ἔχει . . . καὶ παραγραφόμενος ὁ Στέφανος λέγει . . .*: (7) III, 476: *Τὸ πλάτος οὕτως ἔχει . . . παραγραφόμενος δὲ εἰς τὸ ῥητὸν ὁ Στέφανος λέγει . . . καὶ Θαλελαῖός φησιν . . . Δωρόθεος μέντοι . . .* (it seems to be against the rule of Heimbach [VI, 55f.] that the Anonymus quotes here Stephanus and Dorotheus at the same time); (8) III, 478: *Τὸ πλάτος* (cf. *Man.* 289 note *d*) *προληγάτευσα ἔχει . καὶ φησὶν ὁ Στέφανος ἑρμηνεύων τὴν λέξιν . . .*; (9) III, 478: *Τεθεμάτισται ἐν τῷ πλάτει . . . καί φησιν ὁ Στέφανος . . .*; (10) IV, 9: *πρόσκειται εἰς τὸ πλάτος . . . καί φησιν ὁ Στέφανος . . .*; (11) IV, 17: *πρόσκειται εἰς τὸ πλάτος . . . καὶ φησὶν ὁ Στέφανος . . .*; (12) V, 279: *. . . Στέφανος δὲ φησιν ὅτι . . . .*

[52] Peters, *op. cit* 25 n. 70 holds that schol. 10 (*supra* n. 51) belongs to a "new" scholiast who is imitating methods of the old scholiasts. But Heimbach (*Man.* 233 to *Dig.* 5.2.8.pr.) attributes it to the Anonymus, and correctly so: for it refers to the Digest, not to the Basilica. The *schol. Anon.* Heimb. II, 442 (already quoted by Zachariae, *Anekd.* 205 n. 38) is ascribed in its second sentence by Heimbach (*Man.* 228 to *Dig.* 3.2.6; VI, 15 [16] n. 38) to a "new" scholiast, probably because it refers in its first part to the Digest, in its second to the Basilica. But either "cross-references to the Basilica have been added to or interpolated in scholia which are earlier than the compilation of the Basilica" (Lawson, *op. cit.*, 544; cf. Heimb. VI, 208 nn. 24-28) or—what is more probable —a later scholiast copied here a scholion by the Enantiophanes, changing only the reference. This is the only case I know of where a certain probability for quotation of Stephanus by a "new" scholiast exists.

[53] Heimb. VI, 15; 55f. Peters, *op. cit.* 25.

[54] Heimb. VI, 14.

[55] Heimb. VI, 55 n. 10.

ὁμενος) which is habitual with the scholia of the Anonymus.[56] This observation may not afford a cogent argument, but it adds a significant trait to our picture.

If, on the other hand, the Enantiophanes were identical with Stephanus, no explanation could be given for two facts: that the Enantiophanes not only quotes, but criticizes Stephanus;[57] and that the *catena* of the Anonymus divides Stephanus (whose writings antedate it and are used in it) from the Enantiophanes (whose book is of a later date and consequently not used in it).[58]

In conclusion, the arguments for an identification of the Enantiophanes with Stephanus are weak, the arguments against it, rather strong. The identification cannot be accepted.

II

We will have to return to the identification of the Enantiophanes with the Anonymus.[59] Spulber discusses only the three arguments proposed for it by Zachariae, which he rejects without taking cognizance of more recent investigations.

(1) Both the Enantiophanes and the Anonymus declare they have written a monograph, περὶ ληγάτων καὶ μόρτις καῦσα δωρεῶν. Spulber denies the cogency of this argument: two different jurists might have written on the same subject. He forgets that the two references are very elaborate and nearly iden-

[56] Cf. n. 51 *supra*.

[57] Cf. our scholion d. In a similar way, the Anonymus criticizes Stephanus in schol. Ἐπειδή (Heimb. V, 277, to *Dig.* 32.15.1): Στέφανος δὲ λέγει . . . οὐ λέγει δὲ καλῶς . . . .

[58] Peters, *op. cit.* 12.

[59] Spulber is still discussing (pp. 308, 311f.) the old hypothesis of Cujas, which had at first been accepted by Heimbach, *viz.* that the Enantiophanes was the Patriarch Photius. He does not mention that Heimbach later expressly abandoned this theory in favor of that of Zachariae (Heimb. VI, 15 n. 30). Cujas' theory is today no longer worth discussion. I cannot agree with Spulber when he writes (p. 311): "il est regrettable que Zachariae ait cru pouvoir glisser sur cette identification"—only to accept afterwards (p. 313) Zachariae's explanation.

tical. Both are contained in an old and very reliable manuscript, *Cod. Coisl.* 152.[60] The first scholion has the name of the Enantiophanes prefixed,[61] the second, that of the Anonymus.[62] Both texts end by saying:

> εἰσὶ δὲ καὶ ἄλλαι πολλαὶ διαφοραὶ ληγάτου καὶ μόρτις καῦσα δωρεᾶς (last five words missing in schol. 2), ἃς ἀνήγαγον ἐν τῷ γραφέντι μοι μονοβίβλῳ περὶ ληγάτων και μόρτις καῦσα δωρεῶν (ἐγγεγραμμέναι διγ. α΄ τοῦ λ΄ βιβ. add. schol. 2).

Nobody will believe that with these almost identical and rather peculiar words two different authors should refer to two different books which happen to bear the same title. The fact that the two scholia are the only places in which this monograph is mentioned at all[63] makes the identity of the speakers even more pointed.

But Spulber says[64] that for the compiler of the Basilica it was quite natural to quote two famous authors for the same subject; that this compiler had two different books at his disposal; and that therefore the two books, even though they did not bear different names, could not belong to the same author.

[60] I realize as much as anyone that Heimbach's edition of this MS is far from accurate. But here as elsewhere we have to make use of the edition as long as nothing better exists.

[61] Heimb. IV, 604.

[62] Heimb. IV, 612.

[63] But this monograph is also meant implicitly when the Anonymus refers elsewhere (Heimb. IV, 610: *Bas.* xlvii 3.37)—even as at the end of schol. 2 (IV, 612) discussed above—to his annotations on *Dig.* 30.1. The scholion in question (IV, 610) runs: Τοῦ Ἀνωνύμου. περὶ κοινωνίων (this is a new point) καὶ διαφορῶν μόρτις καῦσα δωρεᾶς πρὸς ληγάτον, καὶ ληγάτου προς φιδεϊκόμμισσον ἀνάγνωθι τὰ παραγεγραμμένα ἐν τῷ α΄ διγ. τοῦ λ΄ βιβ. It adds to "the differences between *legata* and *mortis causa donationes*" those between *legata* and *fideicommissa;* quite apropriately it recalls the text of *Dig.* 30.1: "Per omnia exaequata sunt legata fideicommissis;" whereas *Dig.* 39.6.37 pr. (*Bas.* xlvii, 3.37) ends: "quodcumque igitur in legatis iuris est, id in mortis causa donationibus erit accipiendum." Unfortunately *Dig.* 30.1 is missing from our MSS of the Basilica, so we cannot tell what the Anonymus noted there.

[64] P. 309.

This is indeed a strange reasoning. Already Zachariae and Heimbach knew [65] that the compilers of the Basilica did not collect the scholia, but that these were added later as a supplement. Ever since H. Peters discovered the *catena* of the Anonymus,[66] we know that this author collected about 600 A.D. the literature of the sixth century in the form of scholia, and that the amplified *catena* was added to the Basilica only in the tenth century. Hence, the compilers of the Basilica and the later redactors of the scholia did not use the original books at all; they did not see nor had they any opportunity of seeing two different monographs. An assumption to the contrary has no foundation.

If Spulber did not want to accept the explanation of the historical development as given by Peters, he had at least to mention it: for it had found the approval of all contemporary writers.[67] Now, if we follow Peters, it was not even one compiler who collected the two scholia in question. The original *catena* contained only the scholion of the Anonymus while the scholion of the Enantiophanes was added later on,[68] as written

[65] Heimb. VI, 121ff.

[66] Cf. n. 3 *supra*.

[67] E. g.: O. Lenel, *Zeitschr. Sav.-Stift.* Rom Abt. 34 (1913) 390; L. Mitteis, *ibid.* 403f.; Lawson, *loc. cit.*; H. Jolowicz, *Historical Introduction to the Study of Roman Law* (1932) 509f.; Sontis, *op. cit.*, (n. 5 *supra*) 142ff. When Spulber wrote his paper the dissenting opinion of H. J. Scheltema (n. 4 *supra*) was not yet published.

[68] Peters (*op. cit.*, 12) assumed with Zachariae that the *enantiophaneiai* were written later than the *catena* and that the latter therefore did not contain extracts from this work (cf. Lawson, *op. cit.* 547). Previously, Heimbach had concluded (VI, 56 n. 20; 15 n. 32) from a scholion attributed to the Anonymus that the *enantiophaneiai* antedated the *catena* (Peters slipped in reporting on this: instead of "nach der" read: "vor die"). This scholion (Heimb. IV, 280) says: *ἐναντιοφανῶν βιβλίῳ ε΄ τιτ. δ΄ διγέστῳ ζ΄.* Heimbach assumed here a reference to the *enantiophaneiei* in a *schol. Anon.* contained in the *catena*, but Peters translated the passage as "in contradiction to *Dig.* 5.4.7." His interpretation is confirmed by *schol. Steph.* Τὸ Ἀδριάνειον (Heimb. IV, 221) where Stephanus, the teacher of the Anonymus, refers in a similar way to *Dig.* 5.4.7: *μὴ ἐναντιωθῇ σοι δὲ τὸ κείμενον ἐν τῷ ζ΄ διγ. τῆς παρτιαρίας τοῦ παρόντος συντάγματος.*

by himself after the composition of the catena. Yet, in both cases the speaker refers back to his own monograph with nearly the same words. Zachariae's argument thus is fully confirmed when re-examined in the light of more recent findings.

(2) A second argument was taken by Zachariae from *Nomoc.* iv.10, where the compiler of the collection (not its commentator, Balsamon) says:[69]

> καὶ ἄλλα δὲ διάφορα νόμιμα περὶ τούτου συνήγαγον ἐν τῇ γραφείσῃ μοι περὶ ἐναντιοφανειῶν μονοβίβλῳ.

As shown by Zachariae, the texts from the Digest used in the Nomocanon are identical with those reproduced in the Basilica. Since the version of the Basilica is that of the Anonymus,[70] he must also be the author of the Nomocanon. It is therefore the Anonymus himself who says that he has written the monograph on *enantiophaneiai.*

Spulber's only argument against this evidence is his denial that the text of *Nomoc.* iv.10 adopts the version of the Anonymus. Even if this were true, which it is not,[71] the construc-

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If Heimbach is correct in assuming that *schol. Anon.* Καλῶς (Heimb. II, 618) ends at the word *θεμ. γ΄*, then a very similar reference in the part that follows (*Ζήτει ... καὶ τὸ ἐναντιοφανῶν, καὶ . . .*) cannot be adduced to prove that the Anonymus quotes the *enantiophaneiai.* Incidentally, this wording of a "new" scholion recalls two other "new" scholia: Heimb. V, 848 (see the text in Appendix C, *infra*) and 440 (schol. Ὡς στατουλίβερ): . . . *εἴρηται γὰρ τῷ ἐναντιοφανεῖ ἐν τῷ η΄ κεφ. ὅτι* . . . . It would be hazardous to decide whether these three scholia refer to an antinomy or to an extract from a book on *enantiophaneiai* (as suggested by the observation made above, note 1).

[69] Voell. et Just. II, 909 = Ralli et Potli I, 124 = Pitra II, 511; Spulber 311.

[70] There is no dispute about that. Zachariae Αἱ Ῥόπαι (1826) 171 n. 19; *Delineatio* (1839) 34; *Anekdota* (1843) 197; *Ueber den Verfasser und die Quellen des Nomokanon in XIV Titeln* (Mémoires Acad. St.-Pétersbourg, ser. VII, 32 [1885] no. 16); *Griech-röm. Recht* (1892) 12. His suggestion has been accepted everywhere, cf. e.g. Pitra II, 438; Heimb. VI, 15 n. 28; Peters, *op. cit.* 13; P. Krüger, *Geschichte der Quellen und Lit. des röm. Rechts* (2nd ed. 1912) 415; B. Kübler, *Geschichte des röm. Rechts* (1925) 440; P. Noailles, *Les collections des Novelles* (1912) I, 209; Sontis, *op. cit.* 148.

[71] Spulber 313: ". . .le texte cité; on y trouve le Digeste dans la version de l'Enantiophanès! (La contradiction exposée dans le *κείμενον* se trouve exacte-

tion of Zachariae as a whole would remain unshaken by such an observation concerning one single piece of text. Spulber goes on to suggest that our text quotes the Digest in the version of the Enantiophanes: but such a version as distinct from that of the Anonymus does not exist, since "Enantiophanes" was occupied with collecting antinomies and cross-references, not with translating the Digest. Where he referred to it, he used the version made by the Anonymus (i. e., by himself) at the time of the *catena*.[72]

Whereas Balsamon's commentary on *Nomoc.* i.3 (*supra* I, 1) paraphrases a scholion of the Anonymus, we have here, in *Nomoc.* iv.10, even as in the scholion of *Cod. Coisl.* 152 (n. 62 *supra*), the original words of the Anonymus himself. It has not been observed until now that the wording of our text and that of the scholion are nearly the same.

schol. Bas.: . . .δὲ καὶ ἄλλαι. . .διαφοραὶ. . .ἃς ἀνήγαγον ἐν τῷ γραφέντι μοι μονοβίβλῳ περὶ. . .

Nomoc.: καὶ ἄλλα δὲ διάφορα. . .συνήγαγον ἐν τῇ γραφείσῃ μοι περὶ . . .μονοβίβλῳ.

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ment dans les Bas. I 64 sous le nom d'Enantiophanès.)" Our text, *Nomoc.* iv.10 has: ὅτι τὸ κυοφορούμενον οὐκ ἔστι μέρος τῆς μητρός. Spulber probably thinks of the last part of *schol. Enant.*: Τὸ ἐγκυμονούμενον, πρὶν ἢ τεχθῇ, μέρος εἶναι τῆς γυναικός. But this wording is not closer to our text than that of *Bas.* ii. 2.24 (Heimb. I. 43): Ὁ τοκετὸς τῆς κλοπιμαίας δούλης οὐκ ἔστι μέρος αὐτῆς, and this is the version of the Anonymus.

[72] The text which the author of the Nomocanon has in mind in his reference to "my book on *enantiophaneiai*" is either that of the schol. *Enant.* cited by Spulber (Heimb. I, 64), or *schol. Enant.* Heimb. IV, 552 (quoted by Pitra II, 511; cf. Peters 13 n. 29). Nothing more can be concluded from this reference, except that the Nomocanon was written after the *enantiophaneiai* which in turn are of a later date than the *catena* (cf. Peters 14; n. 68 *supra*). Consequently the reference in the Nomocanon cannot be derived from a passage of the *catena*.—It is not clear what Spulber means when he says (p. 313) that the compiler of the Nomocanon found texts concerned with the antinomy in question "chez Stephanos". Where did he find them, and where are these texts? Spulber still seems to believe that Photius was the compiler (about 883), though Zachariae proved long ago (cf. notes 35 and 59 *supra*) that the Nomocanon was compiled c. 629-640 by the Anonymus and that the edition of 883 was not made by Photius.

The authorship of the Anonymus is corroborated by this identical phrasing. *Nomoc.* iv.10 alone would suffice to prove that the Anonymus wrote the *enantiophaneiai.*

(3) As a third argument, Zachariae states that both the Anonymus and the Enantiophanes employed the same "dicendi disputandique genus." Spulber calls this argument rather vague, as indeed it appears on first sight. But he who knows something of Zachariae will not easily discount as vague the judgment of such an authority without refuting it in a critical investigation; nor will he be astonished that a detailed examination of the texts shows the correctness of Zachariae's insight. This examination was made in 1870 by Heimbach.[73] Confirming Zachariae's first impression, Heimbach emphasized that both the Anonymus and the Enantiophanes usually introduced their remarks in the same way;[74] that both referred to Digest, Code, and Novels in the same, peculiar style which differs from that of other writers;[75] and that we even have corresponding scholia which, though assigned in the inscriptions one time to the Anonymus, and another time, to the Enantiophanes, agree with each other word for word.[76] In the present paper, we have been able to corroborate this statement by a comparison of two scholia which both refer to the monograph on *legata* and *mortis causa donationes* and by the observation that the scholion of the Enantiophanes (Heimb. IV, 604) and the text of *Nomoc.* iv.10 (Anon.) show an almost identical wording.

Spulber finally adds that the Enantiophanes differs from the Anonymus in that he is much more exegetical and that he always piles up cross-references. Even if this were true it would only fit the nature of his work. An author who is concerned with finding out discrepancies has to quote many texts. If the same author in another work interprets legal texts, he

[73] Heimb. VI, 15.

[74] E. g. by the words *καίτοι, ὁμοίως, ἐν τῷ, εἴρηται, ἀνάγνωθι, περί* (*ibid.* n. 29).

[75] *Loc. cit.*

[76] *Ibid.*, n. 31.

does of course not always illustrate them by so many other texts. Spulber therefore does well not to stress this point. But moreover, he failed to take notice of an observation made in 1929 by F. H. Lawson, who stated that in *Cod. Coisl.* 152 as well as in Zachariae's *Supplementum ed. Bas. Heimb.* (1846) [77] the Anonymus, too, is mainly concerned with cross-references, and that this feature was only obscured by the fact that Heimbach's edition is based on a copy taken by his brother, who on purpose omitted most of the cross-references.[78] Thus the difference between the scholia of the Anonymus and the *enantiophaneiai* is even smaller than we would expect in a case where the same author writes two works that are different in their methodical approach.[79]

It seems today even more probable than before that the *enantiophaneiai* were written by the Anonymus.

Appendix A

A Survey of Scholia

Spulber in an appendix enumerated the scholia with the name of the Enantiophanes prefixed. He did not indicate by what method he selected them. In revising his collection with the aid of Heimbach's *Manuale*, I found that so many scholia of this category are missing in Spulber that a new list seems indispensable. To present here my additions only would cause future students the inconvenience of consulting two lists published in different places. A new, complete list, with the additional scholia in italics, is there-

[77] For this Suppl. cf. Peters 39: "Von den echten παραγραφαί des Anonymos lässt sich sagen, dass sie sich meistens darauf beschränken, Parallelstellen zu notieren und die Excerpte aus den anderen Kommentaren zu ergänzen."

[78] Lawson, *Zeitschr. Sav.-Stift.* Rom. Abt 49 (1929) 224ff., esp. 224: "dass der Anonymos sich fast immer mit Verweisungen auf Parallelstellen (παραπομπαί) beschäftigt." *Id., Law Quart. Rev.* 47 (1931) 544f.

[79] Lawson, *Law Quart. Rev.* 47,539 "Short paragraphae. . .attributed to. . . the Anonymus. They have the same general character as the fragments of the Enantiophanes, but often are less exclusively concerned with cross-references." Sontis (n. 5 *supra*), after a thorough investigation of the work of the Anonymus and that of the Enantiophanes, concludes (pp. 138, 143) that the intrinsic connection of their respective scholia with the *summa* of the Anonymus confirms the identity of both authors.

fore preferable. I have also enumerated the scholia without inscription which are attributed to the Enantiophanes in the *Manuale,* but I have distinguished them by adding: (man). These were intentionally omitted by Spulber, who also did not mention the scholia of the Enantiophanes in Zachariae's *Supplementum* which I have added at the end.

As to the method of reference I have, rather reluctantly, followed Spulber's model, who gives only the pages of Heimbach's edition and repeats the number of any page on which several scholia are found. This method saves space. Numbers are added for the scholia contained in the *Supplementum.*

Heimbach, *Bas.* vol. I:

40 (Sp. has by misprint: 42) 64. 82. *82.* 83. *83*(man). 84. *84. 84.* 250. 252. *255.* 259. *259.* 259(man). 259(man). *259*(man). (267 is a misprint of Sp.). 324. 326. 329 (Sp. has by misprint: 339). 332. 361. *366.* 369. 375 (cf. Heimb. *loc. cit.* note b). 378. 380. 381. 383. 384. *384.* 389. 391. 391. *393*(man). 421. *424. 425. 425. 555. 565. 565. 575. 578. 579.* 584. *587. 595. 599. 611. 620. 678.* 686. 687. (only once). 688. 688. *729.* 731. *732. 753.* (cf. Lawson, *Zeitschr. Sav.-Stift.* Rom Abt. 49 [1929] 219). 767. *767. 771.* (cf. Lawson *loc. cit.*) *773. 773. 781. 782.* 784. *785. 794.* 796. 797. *800. 804.* 806. 808. *809.* 810. *812.*

Vol. II:

1. *1.* 4. 7. *7.* 8. *8.* 9. *12.* 13. 25. (30: mistake of Sp.; schol. 18. is a new scholion; it is more than doubtful that the Enantiophanes mentioned in it should be identical with our author; cf. Sontis, *op. cit.* [*supra* n. 5] 143 n.3, whose scepticism is probably justified). 35. *36.* 41. *42.* 43. *46.* 48. *53. 71. 72. 73. 82. 83.* 90. 91. *93.* 103. *106.* 107. 108. 110. 120. 122. 127. 129. 131. 139 (only once). 140. 142. 180. 181. *181. 181.* 388. 390. 390. 391. *391. 391*(man). *392*(man). *392*(man). *393*(man). *397. 397*(man). 399. 400. *401. 401. 432. 433.* 435. 438. 441. 441. 442. 445. 447. *447.* 449. *450. 467.* 468. 471. *471.* 477. *479. 481. 534.* 535. *542. 545. 546.* 548. *550. 554. 556.* 558. *559. 560.* 561. 580. 582. *590.* 592. 599. 601. 604. *608.* 609. 613. 617. 622. 623. *637* (man). *638.* 640. 674. 675. 676. 677. 677. *681.* 684. 685. 687. *687.* 688. *691. 693*(man). *697.* 698. 703. 704. *706.* 708. 712. *714.* 716. 717.

Vol. III:

55. 58. 59. 150. *152. 152. 166.* 168. 169. 170. 170. 172. 172. *174 202.* 206. 230. *231. 232. 240. 242.* 254. 254. *257. 260. 265.* 266. *270.*

272. 274. *276*. *280*. *282*. 283. *283*. 284. *287*. 288. 289. *290*. *291*. *297*. *297*. *298*. 300. 301. *303*. *304*. 305. 305. *307*. 349. 358. 359. 362. 363. 367. *368*. 370. *370*. *370*(man). 381. 384. *384*(man). 385. 387. 389. *389*(man). 391. *391*. 392. 395. 399. 401. 401. 402. 405. 409. 410. 410. 411. 413. 414. *414*. 415. 416. *418*. *426*. 475. 476. *477*(man). 486. 487. 488. 491. 492. 492. *494*. *500*(man). (587: misprint of Sp.), *689* (man). *693*(man). *694*(man). *716*(man). *717*(man). *720*(man). *722* (man). *741*(man). *751*(man). *752*(man).

Vol. IV:

3. *4*. 15. 19. *27*. *28*(man). 43. *43*(man). *44*(man). *44*(man). *45*(six times, man). *46*(eight times, man). *47*(man). *48*(see Appendix B). *49*. *49*(man). *198*(man). *201*(man). *294*(man). 470. *470*. *471*. 472. *473*. 474. 476. *476*. 478. 478. *479*. *479*. *480*. *480*. *480*. *480*(man). *482*. *482*. 483. 483. 484. 484. 485. 485. 486. 486. 487. 490. 492. 492. 493. 503. 503. 503. 504. 505. 506. 507. 507. 513. 513. 514. 514. 515. 515. 516. 517. 517. *518*. 519. 520. 521. 522. 522. 546. 547. 548. 550. 552. 555. 556. 556. 559(but man. only). 561. *564*. *566*. 569. 569. *571*. *571*. 573. 574. 575. 576. 601. 604. 605. 609. 611. 616. 616. 617. 619. 620. 622. 624. 624. *624*. *624*(man). 627. 628. 629. *633*. *636*(man). 640. *665*. 671. *677*. 685. 685. 686. *688*. 692. 694(only once). 702. *712*. *718*. *720*. 723. 725. 733.

Vol. V (see also Appendix C):

240(?man). 240. *283*(man). *434*(man). *714*(man). *714*(man). *715* (man). *715*(man). *715*(man). *716*. *807*(man). *807*(man).

Zach. *Suppl.*:

7(29). 14(61). 19(91). 24(108). 24(112). 25(122). 26(129). 28(143). 32(170). 33(173). 33(177) 44(12). 46(20). 46(22). 47(25). 49(2). 51(17). 52(22). 53(24). 54(30). 55(40). 57(51). 60(62). 63(5). 63 (7). 64(9). 75(49) 76(54). 77(57). 84(97). 88(113). 90(118). 90(119). 91(122). 98(3). 99(2). 102(13). 104(28). 106(38). 107(41). 115(7). 133(8). 145(54). 148(65). 149(69). 150(71). 150 (72). 151(75). 183(35). 186(57). 186(60). 186(61). 192(17). 199 (38). 209(28). 212(59). 215(80). 224(147). 229(194). 231(210). 232(214). 233(220). 233(227). 234(231). 234(232). 238(17). 240 (10). 241(18).

Appendix B

Note on Heimb. IV, 48

This scholion is taken from *Cod. Par. gr.* 1345. A photograph of fol. 58 shows indeed a separate scholion where the *schol. Anon.* begins according to Heimb. *Manuale.* But this scholion soon ends with τιτ. α' διγ. ιη'. Before the next words (ἐὰν πρώτην) the name of Kalokyros is inserted. This name and what follows does not belong to schol. 2 (as in Heimbach's edition), which is in the inner *catena,* but forms part of an outer *catena,* as often found in this MS. The inner catena continues by the schol. Κυρίλλου (Heimb. IV, 49). The scholion of Kalokyros is followed by another one, introduced as Τοῦ αὐτοῦ: this scholion, which Heimbach attributed to the Enantiophanes, belongs therefore with the first one to the outer *catena* and to Kalokyros. This example shows once more (cf. note 60 *supra*) that Heimbach's edition, admirable though it is, needs revision.

Appendix C

Additional Note on Spulber's List

I do not understand the following remarks of Spulber in his "Appendice", under "Tome V":

(*a*) "543, renvoi au l. VIII, 2, 9; ici il n'y a pas d'Enantiophanès, mais une lacune où peut-être il se trouvait."—In Heimb. V, 543 (or in V, 541, 542, 544, 545 or in V, 343, 443. 643, 743, 843) there is no scholion referring to *Bas.* viii.2.9, nor any *schol. Enant.;* and as for *Bas.* viii.2.9 (Heimb. I, 363) *Cod. Coisl.* 151 and *Cod. Esc.* do not contain scholia.

(b) "716-848, renvoi au l. XXI, 1, 4: ici existe une scolie (*note 1*: Cette scolie n'est pas même de l'Enantiophanès, elle est de l'Anonyme. Zachariae la cite parce que dans sa thése l'Anonyme = Enantiophanès) précisément dans la matière et avec des antinomies, mais sans l'inscription Enantiophanès, probablement omise par les copistes."

In fact, Heimb. V, 716 has a scholion with no name prefixed (Heimb. *Manuale* also does not mention it, because Heimbach considers it a "new scholion"). It refers to *Bas.* xxviii.8.44 (Heimb. III, 280) where a *schol. Enant.* (omitted in Spulber's list) is attached to *Bas.* xxviii.8.45.

Heimb. V, 848 (*Bas.* lx. 50.22) has a scholion of a "new" scholiast:

> Ζήτει βιβ. κα′ τιτ. α′ κεφ.γ′ θεμ. παρατελευτ. (= Heimb. II, 387 = *Dig.* 22.5.3.5) καί κεφ. λα′ καί τήν αὐτοῦ παραγραφήν, καὶ κεφ. δ′ καὶ τὸ ἐν αὐτῷ ἐναντιοφανές. ζήτει κεφ. ιζ′ καὶ τὰ ἐν τῷ ε′ θεμ. τοῦ α′ κεφ. παραγραφέντα.

(1) The scholion does not refer to *Bas.* xxi.1.4 (Heimb. II, 391f.).

(2) If the scholion to *Bas.* xxi.1.4 belongs to the Anonymus and not to the Enantiophanes (for Spulber two different writers), why should the name "omitted by the copyist" be that of the Enantiophanes?

(3) Zachariae (*Anekdota* 205 n. 38) does not refer to any scholion to *Bas.* xxi.1.4 (Heimb. II, 391f.) but to Heimb. II, 448.

(4) The words τὸ ἐν αὐτῷ ἐναντιοφανές have nothing to do with the Enantiophanes or his *enantiophaneiai,* but simply cite an antinomy to the rule under discussion (*viz.* that slaves may not be tormented in order to elicit evidence against their masters). The antinomy is similarly expressed as in Heimb. IV, 280 (cf. note 68 *supra*): ἐναντιοφανῶν βιβλίῳ ε′ τιτ. δ′ διγέστῳ ζ′ and in Heimb. II, 618 (cf. *ibid.*): καὶ τὸ ἐναντιοφανῶν.

(5) Such an antinomy is not to be found in *Bas.* xxi.1.4. The three scholia which we have in this place (Heimb. II, 391f.) are attributed to the Enantiophanes in the *Manuale,* they do not bear the name of the Anonymus as Spulber maintains. Moreover, they do not contain a fitting antinomy, for they do not speak of a slave.

(6) The reference καὶ κεφ. δ′ in our scholion (*Bas.* lx.50.22) means *Bas.* lx.50.4, not xxi.1.4, even as the surrounding citations (c.31, c. 17, c.1 them.5) refer to *Bas.* lx.50.31; lx.50.17; lx.50.1.5. All these texts are indeed connected with the subject discussed in our scholion. In *Bas.* lx.50.4 (Heimb. V, 841) there is a discussion about the tormenting of slaves, and schol.2 *h.l.* ends: βασανίζονται ἐν τῷ θέματι τούτῳ οἱ οἰκέται κατὰ τοῦ δεσπότου, whereas *Bas.* lx.50.22 begins: Δοῦλος κατὰ δεσπότου οὐ βασανίζεται. We are not concerned here with the question whether this really constitutes an antinomy: the "new scholiasts" did not possess the thorough understanding of legal problems which is to be expected of the old scholia.

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THE GHOST STORY OF THE "CHEERFUL GIVER" IN MEDIEVAL AND MODERN CIVIL LAW

IN a recent article I have traced the history of a moral idea—the meaning of goodwill in action and especially in giving—from its beginnings to its incorporation into Justinian's Digests.[1] It is enticing to track down the historical continuity and the later history of this conflict between ethics and law in the medieval and the modern law of donations. At first the conflict absorbed the thought of great philosophers and of the leaders of rising Christianity. Then it acted upon lawyers and lawgivers through the centuries.

I

St. Paul's famous sentence in the Second Epistle to the Corinthians, chap. 9. v. 7: "God loveth a cheerful giver"[2] forms the starting point of a protracted evolution. He who gives, must not do so "grudgingly" (ἐκ λύπης), but with a cheerful attitude of mind. St. Paul did not invent this sentence. A long history preceded it. Two distinct evolutions are discernible: one, Scriptural—Jewish,[3] and the other,

[1] "Ethics vs. Law: St. Paul, the Fathers of the Church and the 'Cheerful Giver,' in Roman Law," *Traditio,* II (1944) 97-121 (referred to in the following as *Ethics vs. Law*). In the present paper the evolution up to the time of Justinian is only briefly sketched as far as it is necessary for the understanding of the continuity.

[2] Ἱλαρὸν γὰρ δότην ἀγαπᾶ ὁ θεός. The word ἱλαρός corresponds to the Latin *hilarus* (or *hilaris*). It means "cheerful", "joyful", "bright", in later Greek at times "benevolent". In this usage, the inherent connection between cheerfulness and benevolence might well be sensed (for references see Ethics *vs.* Law, p. 98, n. 10, pp. 100, 110 and *passim*).

[3] I owe additional information concerning the Jewish evolution to Professor Boaz Cohen (New York) and Professor Ernst J. Cohn (London), both of whom supplied new material after publication of my article in *Traditio.* This will be published on another occasion. Since it would go beyond the frame of the present study, only the following may be quoted here: "Rab-

Greek-Hellenistic.[4] Thus, for instance, Aristotle devoted a thorough investigation to giving "in proper fashion" (ὀρθῶς), in connection with his treatment of "liberality",[5] and the Stoics did the same. St. Paul's sentence about the "cheerful giver" has been dealt with again and again, among others by the Apostolic Fathers, by Clement of Alexandria (around 200 A.D.), and above all by St. John Chrysostom, the greatest preacher of the Oriental Church (354-407). His numerous sermons treated over and over the central Christian command of charity (ἐλεημοσύνη), the gifts for the poor; and in this connection Chysostom stressed the point that the gift must not be prompted by selfish motives on the part of the giver. But St. John Chrysostom is asking more than to give cheerfully, as St. Paul did. He fought vigorously any gift which might be aimed at a selfish advantage, at the "desire to obtain more" (πλεονεξία). Among the accessory selfish motives of which he disapproved, Chrysostom counted also non-material advantages to the donor such as prestige and honor.[6]

When, in the Byzantine Period, donation was advancing to the fore as the noblest transaction of christianized Roman Civil Law, the "cheerful giver" entered in state into the Di-

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binical ethics developed a special conception of good deeds, done in a spirit of liberal-mindedness". "The Hebrew phrase '*Tob aygin*', a bountiful eye, was understood by the rabbis as a generous giver and a benevolent mind".

[4] Giving cheerfully has had a special appeal to the Greek mind, at all times. The *New York Times* of April 21, 1946, reports on the front page: "Cretans reject Allied rewards for aid given stranded soldiers . . (it) 'cannot be assessed in terms of cash', the Allied Screening Commission has learned in its attempt to reimburse members of the underground forces in Crete. Out of 2,329 persons whom the commission attempted to reward for having helped the Allied cause under enemy occupation, '2,264 refused to accept a single penny.' In some cases the offers were met with expressions of wounded pride, the commission members added."—This is the old Greek attitude of mind, helping and donating cheerfully, without any regard for one's own interest. It was as amazing to the business-minded Romans (cf. *Ethics vs. Law,* pp. 111 ff.) as it is today to the Allied Commission.

[5] *Nic. Eth.* IV, 1 and 2.

[6] Numerous references in *Ethics vs. Law,* pp. 109-111, furthermore in my article: "Die Gesinnung des Schenkers bei Johannes Chrysostomus," *Mnemosyna Pappoulias* (Athens, 1934), pp. 66-75.

gest. Justinian took over St. Paul's demand as it was shaped by St. John Chrysostom. He incorporated into the concept of the donation, as an essential part, the condition it must be based on no other motives than liberality and generosity—"et propter nullam aliam causam fecit (the donator) quam ut liberalitatem et munificentiam exerceat" (*Dig.* 39, 5, 1 pr).[7] This is the so-called *causa liberalitatis.* Herewith Justinian introduced a piece of Chrysostom's sermons into the Digest. The Saint's influence upon the leading circles of Byzantium was tremendous during his lifetime and even more so in the centuries after his death.[8] In addition among the contemporary theologians who may have influenced Justinian,[9] Bishop Theodor Askidas might be taken into consideration: it has been argued that he is the author of theological treatises, edicts and letters published by Justinian.[10]

In addition to the inclusion of "cheerful giving" into the definition of donation, the Byzantines endeavored to mention *liberalitas* also in a number of other passages.[11] In so doing they were, however, paying only lip service to this religious and ethical principle. The practical implications were not drawn. In cases of donations, e. g. "ea spe quod se ab eo qui acceperit, remunerari existimaret vel amiciorem esse futurum" (*Dig.* 12, 4, 3, 7,) or "hereditatis captandae causa, id est spe futurae successionis" (*Cod. Iust.* 2, 4, 25), these donations were declared valid by preserving the pre-Justinian decisions—in spite of absolutely selfish motives. It was practically impossible to enforce the moral de-

[7] Concerning the difference between *animus donandi* and *liberalitas,* see F. Pringsheim "Animus donandi," *Zeitschrift der Savigny Stiftung,* Rom.Abt., LII (1921), 287 (cf. *ibid.* L, 421, n. 3); *Ethics vs. Law,* pp. 115ff.

[8] For references see: Bruck, 'Kirchlich-soziales Erbrecht in Byzanz, Johannes Chrysostomus und die Mazedonischen Kaiser," *Studi Riccobono,* III (Palermo, 1933), 416-420.

[9] Cf. *Ethics vs. Law,* p. 117.

[10] B. Altaner, *Patrologie* (Freiburg i.B., 1938), p. 332.

[11] *Dig.* 34, 4, 18 and other citations, cf. Pringsheim, *op. cit.,* LII, 287ff.; Hugo Burckhard, *Zum Begriff der Schenkung* (Erlangen, 1899), p. 137; Bruck, *Mnemosyna Pappoulias,* p. 76f.; and *Ethics vs. Law,* p. 118f.

mand in law. Ethics and law are separated by boundary lines which not even the powerful Emperor Justinian was able to eliminate. St. Augustine and later St. Thomas Aquinas, among others, clearly recognized these limits.[12] Not every moral demand can be enforced in the *civitas terrena.*

II

One might suppose that the *echec* of the inclusion of a religious and moral command into the Digest would have demonstrated that the experiment had to be considered a failure once for all. But—and this is remarkable in the further development of the doctrine—the unenforceable rule of Justinian, which required that the donation must not be performed for any other motive than *liberalitas* and *munificentia,* has occupied the science of law for more than a thousand years and contributed to the institution of many a lawsuit. The " cheerful giver " always turned up again and again, even in statute books. To be sure all this is more the " ghost story " of this concept—to use a term coined by Sir Paul Vinogradoff with reference to the survival of Roman Law in the Middle Ages and the Renaissance.[13]

Various factors explain this survival. In the first place, the *causa liberalitatis* as an element of the legal definition of gift was placed in a conspicuous place in the Digest, at the very beginning of the title *De donationibus.* Jurists are conservative people. " Alius alium exscribit " [14] this is true not for the Glossators alone. A further important factor was unclear thinking, the importance of which cannot be overestimated in mankind's fate and history. Time and again the unselfish motive, the *causa liberalitatis* was confused with the donor's will to perform a gratuitous transfer of property, the *animus donandi.*[15]

[12] References in *Ethics vs. Law,* p. 117, n. 139; p. 120, n. 155.

[13] *Roman Law in Medieval Europe* (2nd ed., Oxford, 1929), p. 13.

[14] Thus, about the Glossators in general, Hermann Kantorowicz, *Studies in the Glossators of Roman Law* (Cambridge, 1938), p. 317.

[15] Pringsheim, *op. cit.,* p. 287ff.; *Ethics vs. Law,* p. 120 ff.

The following pages do not purport to give an extensive history of the concept of the donation.[16] Rather do they endeavor to bring into relief characteristic examples from the history of the survival of *liberalitas*.

The "Gloss of Turin" on Justinian's Institutes took the position of Justinian's interpolations in the Digest. This gloss was, after all, written in the era of Justinian or shortly thereafter.[17] It defined: "Donatio est voluntaria et larga datio ex nulla necessitate sumens originem."[18]

The *Glossa ordinaria* comments upon the words *propter nullam aliam causam facit, quam ut liberalitatem et munificentiam exerceat* (*Dig.* 39, 5, 1 pr.) as follows: "Liberalitatem: id est animi voluntatem ab avaritia et aliis vitiis liberam et laus inest donanti et haec proprie dicitur donatio." That is, it requires for the donation "a will free from avarice and other vices." It is interesting that the gloss conceives of the *liberalitas* of Justinian in the spirit of his source, St. John Chrysostom, although, of course, the glossators did not know of this historical connection, and they had hardly read Chrysostom himself. But the Glossators were familiar with theology, and *avaritia* and *alia vitia* were topics current in sermons and treatises of moral theology.

Typical for the Glossators' way of thinking are the references by which they support their interpretation. It is well known that the Glossators sought to justify their own doctrine whenever possible by citing Justinian's texts, which were "sacred books" to them, comparable to the authority of the Bible, the Fathers, and Aristotle for the Scholastics.[19]

[16] Cf. in this respect Burckhard, *op. cit.*, pp. 76ff., 131ff.

[17] Max Conrat, *Geschichte der Quellen und Literatur des römischen Rechts im früheren Mittelalter*, I (1891), p. 110f.; E. Genzmer, *Zeitschrift der Savigny Stiftung*, Rom. Abt. LII (1932), 453.

[18] Edition by P. Krüger, No. 127 (*Zeitschrift für Rechtsgeschichte*, VII [1868], 60).

[19] E. Genzmer, "Die Justinianische Kodifikation und die Glossatoren," *Atti del Congresso Internazionale di Diritto Romano*, (Pavia, 1934), 384; Vinogradoff, *op. cit.*, (n. 13), p. 57.

They refer, for their interpretation of the word *liberalitas* to the *lex "donari", h.t.* (*Dig.* 39, 5, 29: "Donari videtur quod nullo iure cogente conceditur"), but their own interpretation is theologically coloured and surpasses this argumentation when they require "animi voluntatem ab avaritia et aliis vitiis liberam."

Concerning the words *laus inest donanti,* the gloss refers to "de verb. signi. l. *munus proprie*" (Marcianus, *Dig.* 50, 16, 214).[20] It is significant that the Glossators picked out this very text. The words of praise do not originate with the classical jurist Marcianus.[21] The Romans of classical times had a strong aversion against donations.[22] Only the Christian-Byzantine period had words of praise for donating (*laus inest*).

Azo's influential *Summa* defined donation as "quaedam mera liberalitas, quae nullo cogente conceditur."[23]

Special attention was given to the donor's attitude of mind in Spain. It found its way into the famous law code of Alfonso the Wise (1265 A.D.), *Las Siete Partidas,* which belongs to the end of the period of the Glossators. Justinian's codification furnished the bulk of the contents of this great code of Castile. Partida IV, tit. IV, law 1, defined: "a gift is a good act born of nobleness and kindness of heart" (*un bien fecho, que nace de nobleza è bondad de corazon*) when it is made without any compulsion. The emphasis on the *nobleza* besides the *bondad de corazon* is a characteristic feature of this Spanish version of the *liberalitas.*

In Partida III, tit. XXII, law 26, the bribery of judges was treated by an elaborate casuistry.[24] The law deals, first with

[20] "Quae si non praestentur (sc.dona), nulla reprehensio et, si praestentur, plerumque laus inest."

[21] G. von Beseler, *Beiträge zur Kritik der römischen Rechtsquellen,* V. p. 79.

[22] Cf. *Ethics vs. Law,* pp. 111-114.

[23] *Summa Azonis* (ed. Henr. Dresij, Venetiis, 1590), in IX.Lib. Codicis de donationibus, p. 876, cf. *ibid* p. 878, annot. a.

[24] For these references I am indebted to the kindness of Professor Gordon Ireland, Washington, D. C.

the accuser who "gives anything to a judge who is to determine a case, *in order that he may wrongfully decide against the accused party*: He shall lose his claim and the accused shall be discharged." Furthermore the accuser shall receive punishment. Next, the case is dealt with where an accused party "gives or promises a judge anything *to induce him to acquit him of the offence.* He should be punished just as if he had confessed or the accusation against him had been proved." The law did not distinguish between the case of bribery in which an illegal decision by the judge in favor of the donor had been expressly made a condition of the donation and the case in which the donation had been made unconditionally though in expectation of a favorable decision. The first case is a typical example of a donation with a selfish motive.

The Partidas furthermore deal with the remarkable case "where it is certain that he (the accused party) did not commit the offence of which he was accused, but that *he gave something to the judge because he was afraid to conduct his case, being a man deficient in courage.*" There shall be no punishment of this frightened giver. Finally the law ruled for the case in which both parties to a suit made a gift to the judge. In that event, they shall give to the king three times the amount which they had given to the judge and both parties shall forfeit all rights under the lawsuit. Similar provisions to those in the Partidas are found in many later enactments.[25]

III

Bartolus notes to *Dig.* 39, 5, 1: "Ista est subtilis lex." He demands *liberalitas* as a necessary feature of a genuine donation, and he refers especially to the gloss.[26]

[25] For instance: Alonso at Valladolid (1325), Pet. 2;—at Segovia (1347), Laws 1 and 2;—Ordinance of Alcala (1348), Tit. 20, Laws 1 and 2;— Juan I at Birbiesca (1378), Pet. 24;—Recop. (1567) Lib. III, Tit. IX, Law 5;— Nov. Recop. (1805), Lib. XI, Tit. II, Law 7. (References supplied by Professor Ireland).

[26] Bartoli a Saxoferrato *Commentaria,* V (ed. Venetiis, 1602), 53: "Donatio propria est, quae fit ex liberalitate et irrevocabiliter. Sed quae sub condicione

In the sixteenth century Cujas defined a donation as the "alienatio rei quae liberalitatis causa fit hac mente ut nullo casu recipiatur."[27] In a stronger way, Donellus, stressed the necessity of the benevolent attitude of mind on the part of the donor,[28] a fact which goes well together with the rigorism of this Calvinist scholar who combined religion and jurisprudence.[29] François Hotman (Hotomanus, d. 1590), Professor at Lausanne, Bourges (where he succeeded Cujas), and Basel,[30] drew a distinction between *donatio directa* and *donatio negotialis.* The former, he claimed, is effective "solius liberalitatis causa et sine ulla negotii gestione." In the latter, there is not only *liberalitas,* but also *negotium geritur.* Into the latter category Hotomanus placed conditional donations and donations *sub modo.*[31]

There was interest for the *causa liberalitatis* in Spain also in the time of the "elegant jurisprudence". According to Antonio Gomez, professor at Salamanca (16th century), part of the concept of donation is that "quis nulla subsistente

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resolvenda, donatio impropria appellatur. Et vide istam glossam in ver. liberalitate, quae incipit: in animi voluntatem."

[27] *Paratitla in lib.* 50 *Dig.* ad tit. 39, 5; cf. Burckhard *op. cit.,* p. 78.

[28] Donelli *Opera omnia,* III (Florence, 1861), cap.XXVI, § 2 (col.1289f.): ". . . etsi donandi praecipuus finis est, ut bene sit donatario, nostrumque animum erga eum propensum hoc modo declaremus, est enim donare liberalitatis et beneficii, cum quid nullo iure cogente convertur in aliquem gratis, non quo quidam ab eo vicissim accipiatur, ut fit in permutatione . . ." On the other hand *donationes ob causam* (*Ibid.* cap. XXVI, § 3) are not genuine donations. "*In his donationis verbo abutimur, cum non sit donatio merae liberalitatis*: magisque totum hoc genus donationum ad superius illud ob causam datorum referendum est. . ."

[29] R. Stintzing, *Geschichte der deutschen Rechtswissenschaft* (1880), I, 377.

[30] Stintzing, p. 383; cf. Burckhard, p. 68.

[31] Giphanius (Hubert van Giffen, 1534-1609, Professor in Altdorf und Ingolstadt; cf. Bezold in *Holtzendorff's Rechtslexikon,* II, [3rd ed.], 184) distinguished in a similar way *donatio vera* (*liberalitatis causa*) and *non vera;* cf. Burckhard, p. 78.—On the other hand, Dionysius Gothofredus comments on "*liberalitas et munificentia*" only with the words: "*Huiusmodi donatio sit nullo cogente*" (Dig. 35, 5,29.).

causa, sed propter solam liberalitatem donat alteri pecuniam, rem vel aliqua bona sua."[32]

Joseph Fernandez de Retes, likewise professor at Salamanca (17th century), dealt in detail with the donation for selfish motives in his treatise *De Donationibus*.[33] With great erudition, De Retes analyzes *liberalitas* first from the moral point of view. He quotes from Aristotle, Seneca, Thomas Aquinas, also from "Our Alfonso the Wise", and others: "Multa adducunt Philosophi Ethici, et noviores politici ad commendationem liberalitatis, quibus abstinendum duximus." He arrives at the result that *liberalitas,* like every other virtue, is a quality, a habit which springs from a multitude of acts. Therefore, he claims, every donation must participate in the state of *liberalitas,* and be performed *ob solam munificentiam exercendam.* But then he admits that civil law could not follow philosophical ethics, as far as the *motive* is concerned. One would expect that De Retes would go on and declare that the law was unable to control presence or absence of *liberalitas,* and that, consequently, in law this concept should be eliminated altogether. Instead, De Retes makes the surprising statement that law and philosophy do agree on certain features after all: what happens "gratuitously" is always, he concludes, performed "for the motive of generosity alone."[34] The learned professor from Salamanca thus offers a model example of the confusion of gratuitousness with the motive of unselfishness (*liberalitas*).

IV

How tenaciously time clung to the old *liberalitas* of Justinian is shown by the evolution of doctrine in connection

[32] *Commentarius,* II, cap. 4; cf. Burckhard, p. 77.

[33] De Retes dictated his lengthy treatises in his lectures. They are reprinted in Gerardus Meerman, *Novus Thesaurus Iuris Civilis et Canonici* (Hagae-Comitum, 1753), VII, 557ff. (cf. VI, 375).

[34] "In ceteris requisitis jus a philosophia non distat. Nempe, quod fiat *gratuito,* l. Donari 29, hoc tit. (*Dig.* 39, 5) et *ex sola causa munificentiae exercendae* 1. hoc eod. titulo;" De Retes, *De Donationibus,* cap. II, 9 (Meerman VI, 563).

with the statute books of the time of Enlightenment. The Prussian *Allgemeine Landrecht* (which goes back to Frederick the Great but was published only 1794), the French *Code Civil* (1804), and the Austrian *Allgemeine Bürgerliche Gesetzbuch* (1811) no longer required the unselfish attitude of mind as a feature of the concept of donation.[35] Still, the textbooks and commentaries to these codes were written in a Romanistic spirit and frequently insisted on the old *liberalitas*. The leading textbook of the Prussian law, by Foerster and Eccius, demands "that the donor make a donation, not in his own interest, but solely in the interest of the donee, that the donor be fully aware of it, and that he so desire it."[36] The outstanding manual of Austrian civil law by Joseph Unger declares in the same vein: "The donation . . . is an act of liberality, that is, an act of unselfishness."[37] And the widely known treatise of French civil law by Planiol and Ripert contains sentences like this:

> "Le donateur n'a en principe d' autre but que de faire un acte agréable à autrui. Il est désintéressé. Il a uniquement le désire de gratifier. C'est ce sentiment purement altruiste qui est à proprement parler l'animus donandi."[38]

E. g., in donations of merchants to their customers the concept of donation is denied. To be sure, the text continues:

[35] Prussia: *Allgemeines Landrecht,* part I, tit. II, § 1037; France: *Code civil,* art. 894; Austria: *Bürgerliches Gesetzbuch* § 938.

[36] *Preussisches Privatrecht* II (6th ed. 1892), 8.—H. Dernburg, *Lehrbuch des Preuss. Privatrechts* II (5th ed., 1897), 437, disagrees with this.

[37] *System des Österreichischen Allgemeinen Privatrechts* II (4th ed., 1876), p. 190. In agreement: M. von Stubenrauch, *Commentar zum Österr. Allg. Bürgerl. Gesetzbuch,* II (7th ed., 1899), p. 132, n. IId to § 939.—However, A. Ehrenzweig, *System des Öster. Allg. Privatrechts* (6th ed., 1920), § 355, and Swoboda (in Klang's *Commentary to the Allg. Bürgerl. Gesetzbuch,* II, 2 to § 936) disagree.

[38] M. Planiol et G. Ripert, *Traité pratique de droit civil français,* V (Paris 1933), 325.

"Un tel sentiment est anormal dans la société, parce que la loi est bien obligée de supposer que l' intérêt est le mobile des actions." [39]

V

In contrast to the earlier statute books, in two codifications derived from the Code Civil, namely, the Spanish *Código Civil Concordado* (published October 6, 1888) and the *Codice Civile Italiano* (July 25, 1865), the "cheerful giver" has come to life again. The Spanish Código defines in art. 618 that a donation is an act of liberality by which a person disposes gratuitously of a thing in favor of another person, who accepts it. The principle commentators (Falcón, 1889; Robles, 1896; Diaz y Martinez, 1901; Manresa, 5th ed. 1932) agree that liberality, which is the essential basis and characteristic quality of donation, does not permit any intention, however hidden, of gain by the donor.[40] Particularly clear on this point was "Quintus Mucius Scaevola, Avogado del Ilustre Colego de Madrid," a Spanish legal writer who published under this pseudonym a number of legal works between 1890 and 1915, among them a great commentary to the *Código Civil Concordado.*[41] Scaevola sharply criticized art. 618 of the Código Civil for its demand of "liberality" in addition to gratuitousness. "Liberality" and "gratuitousness", he emphasized, are not identical.

"The former corresponds to the pure intention of the donor, and the latter, to the nature of the contract . . . ; a juridical institution cannot be qualified by, nor can there be considered as a substantial character of it, that element which, residing in the conscience of the person, or, rather, referring to inten-

[39] Therefore the requirement of the unselfish motives is turned down in G. Baudry—Lacantinerie, *Précis de droit civil,* II (8th ed., 1903), p. 247 to art. 894, who still speaks of donation as *un contrat de bienfaisance,* but does not draw any consequences.

[40] References and the following translation of Scaevola supplied by Professor Ireland.

[41] Quintus Mucius Scaevola, *Código Civil Concordado,* XI (1896), 392.

> tions for the future, escapes the most subtle and distilled foresight . . . There might well be eliminated from the definition we are examining . . . the attribute of liberality, included by our national legislators in art. 618."

Scaevola's clear distinction between gratuitousness and liberality compares favorably with the confusion of his older fellow countryman, De Retes.[42]

VI

On the other hand, in the course of the nineteenth century, the view prevailed in the science of the *Gemeines Recht* (the Roman law valid in Germany) that pure benevolence was no longer required by the concept of donation. Thus, Savigny taught:

> "The donator may hope to create an affection by the gift which, in the future, should bring him far greater advantages; he may donate from pure vanity to impress others with wealth and liberality. In all these cases it is real donation because in the first instance the enrichment of the other party is really intended, even if only in order to attain this more distant goal."[43]

The literature of the *Gemeines Recht* on the whole, followed Savigny.[44]

[42] Art. 1050 of the *Codice Civile Italiano* defines donation: 'La donazione è un atto di spontanea liberalità, col quale il donante si spoglia attualmente e irrevocabilmente della cosa donata in favore del donatario che l' accetta". Cf. R. de Ruggiero, *Istituzioni di Diritto civile,* II (5th ed., Messina, 1930), 433. "Il carattere più saliente di tutto il rapporto è lo spirito di liberalità." In agreement: Fadda, Porro, Raimondi, Vedani, *Prima raccolta completa della Giurisprudenza sul Codice civile,* IV (Milano, 1915), 218 no. 248 to art. 1050, and others.

[43] *System des heutigen römischen Rechts* (1841), IV, 87.

[44] Cf. F. F. Sintenis, *Das praktische gemeine Civilrecht,* I (2nd ed., Leipzig, 1860), 200, n. 5, and the *Pandekten* by Windscheid-Kipp (8th ed., 1900), p. 506; Brinz—Lotmar (2nd ed., 1892), IV, 247; Dernburg, (4th ed., 1894), p. 288. It is interesting to observe, how an eminent practitioner of the German-Roman "Common Law," later Justice of the Supreme Court (*Reichsgerichts-*

Towards the end of the nineteenth century the "cheerful giver" attempted once more to find admission into a great legal code. He emerged in the meeting room of the Second Commission for the preparation of the German *Bürgerliches Gesetzbuch*. But he found no longer the pleasant reception which was accorded to him by Justinian's commission about 1500 years earlier. The *Records of the Commission for the Second Reading of the Proposal for a German Civil Code*, vol. II (1898), 25, relate: "There was consensus of opinion . . . that . . . . even a gift made with a purely selfish motive falls under the concept of donation."

Here ends the long journey of the "cheerful giver" through the history of law. In the moral realm he will live forever.

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rat), Otto Bähr, conveys the words originating from St. John Chrysostom and Justinian in the pointed and complicated style of the German Pandectists of the 19th century (*Die Anerkennung als Verpflichtungsgrund*, Cassel, 1867, p. 12): "Derjenige schenkt, 'qui propter nullam aliam causam dat, quam ut liberalitatem et munificentiam exerceat,' Dig. 39, 5, 1 pr., welcher also eine Vermögenszuwendung um ihrer selbst willen vernimmt. Der Charakter der Schenkung besteht demnach in der Identifizierung der Vermögensübertragung mit ihrem Zwecke, mithin in der Negation einer anderweiten causa; diese bewusste Negation wird subjektiv selbst zu einer causa."

HOBBES' THEORY OF LAW *

I say it advisedly, if you would think clearly of rights and duties, sovereignty and law, you must begin with the criticism of Hobbes.
Pogson Smith.

HOBBES divided philosophy into three parts, *Corpus, Homo, Civis,* that is, a system of Matter, Man and the State, and he aimed to give a complete account of the entire domain.[1] His starting point was the idea of motion. Hobbes' philosophical views matured late, and it is not clear at what stage of his thought he became impressed with the fundamental importance of the ubiquity of motion in nature. On his third trip to the Continent, which lasted from 1634 to 1637, he was haunted during the whole journey by the idea. He himself traces his realization of the significance of the conception to the following incident, which has not been dated.[2] At a gathering of learned men, where he happened to be, someone mentioned sensation. It was at once disposed of with the contemptuous question: "What is sense?" Hobbes thought it singular that men who regarded themselves as wise should be ignorant of the nature of their own senses. He pondered long about the matter, and concluded finally that if all bodies were at rest or all moved alike, no distinctions could be made, and therefore all sensation would be abolished. Hence the cause of all things must be

* Paper read at the meeting of the Riccobono Seminar of Roman Law in America, Washington, D. C., November 19, 1945.

[1] Works 12. References are to *The English Works of Thomas Hobbes,* edited by Sir William Molesworth, 11 vols., (1839-45). References to *The Elements of Law* are to Tönnies' edition, *Cambridge English Classics,* (1928). All citations to the *Leviathan* have been compared with the text of my own copy of the 1651 edition. For the Latin works the references are to the *Opera philosophica quae latine scripsit omnia,* edited by Sir William Molesworth, 5 vols. (1839-45) and are cited "*L. Works*".

[2] 1 *L. Works* xx.

sought in the difference of movements. On the basis of this principle, Hobbes planned to explain the nature of Matter, Man and the State.

Inasmuch as all things have but "one universal cause, which is motion," [3] Hobbes thought that all inquiry must begin with geometry, which investigates simple motion. All writers, he remarks, "as are ignorant of geometry, do but make their readers and hearers lose their time".[4] From a consideration of the principles of simple motion, the inquiry would pass to the motions of bodies, or physics, and thence to Man, inasmuch as the "motions of the mind. . . have their causes in sense and imagination," [5] which are subjects of physics. Finally, from these inquiries there would be deduced "the causes and necessity of constituting commonwealths." [6] Hobbes was thus able to deduce a theory of law and justice from a principle of mechanics. He did not live to complete his system, or even to organize all that he was able to compose.

At bottom Hobbes therefore envisaged an explanatory deductive system necessarily of a postulational character. He was attempting something more than a classification of the fields of inquiry—the ethics, physics and dialectics of Plato, the theoretical, practical and productive of Aristotle, the *trivium* and *quadrivium* of the middle ages, and the history, poesy and philosophy of his employer, Bacon. His definition of philosophy allowed for such a classification:

> Philosophy is such knowledge of effects or appearances, as we acquire by true ratiocination from the knowledge we have first of their causes or generation: And again, of such causes or generations as may be from knowing first their effects.[7]

[3] 1 *Works* 69.

[4] 1 *Works* 73.

[5] 1 *Works* 72-3.

[6] 1 *Works* 74.

[7] 1 *Works* 3.

This definition at once marks off history, which is the record of past experience; "whereas sense and memory are but knowledge of fact, which is a thing past and irrevocable; science is the knowledge of consequences and dependence of one fact upon another." [8] It also distinguishes theology, since by definition God had no cause. Although his approach yielded a classification, his aim had a much greater significance. He sought, and believed he had found, a formula that embraced all the phenomena of the universe, insofar as they were capable of expression through matter and motion treated from the point of view of causal processes. Such formulae are not unusual in the history of thought, and may be traced to the Stoics, who were perhaps the most vigorous proponents of the idea of the full causal linkage of all events.[9] In view of the recurrence from time to time of the idea of a "total deduction", Meyerson [10] is inclined to think that it may have a special importance. It implies a belief in the rationality and unity of nature, and therefore the possibility of a deduction of all events. But apart from these considerations, the scheme that Hobbes set himself to carry out placed him at once in the group of great European system-builders who even then were working a transformation of the metaphysical and scientific bases of Western thought. No contemporary rose to such an idea of progressive, scientific explanation, and not until two centuries had elapsed was the idea again so distinctly conceived and seriously carried out.[11]

Hobbes thought of scientific method as reasoning from the effect to the cause, or from the cause to the effect.[12] He believed that the whole method of scientific demonstration is of the latter type—the former being hypothetical—and consists in deducing the conclusion syllogistically from first prin-

[8] 1 *Works* 11; 3 *Works* 35.

[9] 1 Meyerson, *De l'explication dans les sciences* (1921) 111.

[10] *Ibid.* 116.

[11] Robertson, *Hobbes* (1886) 45.

[12] 1 *Works* 312.

ciples.[13] Now such principles are nothing but definitions which, in turn, are nothing but the explication of the meaning of names.[14] A name is defined to be

> a word taken at pleasure to serve for a mark, which may raise in our mind a thought like to some thought we had before, and which being pronounced to others, may be to them a sign of what thought the speaker had, or had not before in his mind,

and originally was given arbitrarily.[15] From this it followed, in Hobbes' opinion, that the fundamental principles of science are constituted arbitrarily, and are not to be demonstrated. Truth and falsity are therefore solely a function of speech,[16] and the truth of our first principles is something man himself has made.[17] All this led Hobbes to a position of extreme nominalism, and to his emphasis upon the arbitrary character of science.

His mature views on methodology were published after he had put forward his psychological and political works. " What was last in order, is yet come forth first in time ", he writes.[18] To give those works validity he had to allow for their methodology, which was not strictly in accord with the ideal system just sketched. Thus, he observes that the causes of the motions of the mind are known, not only by ratiocination, but also by every man who takes the pains to observe those motions for himself.[19] Inasmuch as the principles of politics rest upon a knowledge of psychology, political science itself may be known through man's experience and the examination of his own mind. Self-observation thus becomes a warranted method for psychology and the social sciences, including ju-

[13] 1 *Works* 81.

[14] *Ibid.* and 1 *Works* 70.

[15] 1 *Works* 16.

[16] 1 *Works* 36-7.

[17] 1 *Works* 388.

[18] 2 *Works* 20.

[19] 1 *Works* 73.

risprudence. His legal theory is therefore not necessarily a deduction from the laws of mechanics. In fact, its ultimate basis is an empirical psychology. He was the first to develop that field in modern times, and his contributions to it have been described as epoch-making. This does not mean that he lost sight of the idea of motion in either the *Human Nature* or the *Leviathan.* Thus sensation is held to be a motion inside the body caused by the action of external objects; and delight, pain, love, and hatred "are nothing really but motion about the heart."[20] However, those assertions are more or less taken for granted, and in any event are not deduced in accordance with the principles of his ideal methodology.

Natural Law

From the elaborate psychological analyses prefixed to the various expositions of his political theory, Hobbes drew conclusions of major importance. He believed that he had set forth a complete account of the whole nature of man, which could be reduced to four basic elements, the natural powers of man's body and mind: strength of body, experience, reason, and passion.[21] In the course of the argument that led him to this position he had concluded that good and evil were relative terms. Whatever is the object of any man's appetite or desire, he calls "good"; whatever is the object of his aversion he calls "evil". For these words

> are ever used with relation to the person that useth them: there being nothing simply and absolutely so; nor any common rule of good and evil to be taken from the nature of the objects themselves, but from the person or the man (where there is no commonwealth), or (in a commonwealth) from the person that representeth it, or from an arbitrator or judge, whom men disagreeing shall by consent set up, and make his sentence the rule thereof.[22]

[20] 3 *Works* 42, *Elements* 22.

[21] *Elements* 53.

[22] 3 *Works* 41, *Elements* 22.

If there is no general moral law, it follows that the desires and passions of man are not in themselves censurable. No more are the actions that proceed from those passions, until there is a law that forbids them.[23] Now the first aim of man, it seemed clear to Hobbes, was the assurance of a contented life. That aim can be realized only if man obtains power which, to take it universally, means his present means of obtaining some future apparent good.[24]

> So that in the first place, I put for a general inclination of all mankind, a perpetual and restless desire of power after power that ceaseth only in death. And the cause of this, is not always that a man hopes for a more intensive delight, than he has already attained to; or that he cannot be content with a moderate power; but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more.[25]

His next proposition is that nature has made men so equal in body and mind that one man, on the basis of any supposed difference, cannot claim for himself any benefit to which another may not pretend as well as he.[26] The strongest of body may be overcome by the weakest, either by secret machination or through confederacy with others; as for the mind, setting aside special aptitudes, and coming to prudence, which is experience, there is a greater equality among men than that of strength. For all men think that they have it in a greater degree than others; but this proves rather that men are in

[23] 3 *Works* 114.

[24] 3 *Works* 74, 85.

[25] 3 *Works* 85. *Cf.* Nietzsche's definition of psychology: "All psychology hitherto has run aground on moral prejudices and timidities, it has not dared to launch out into the depths. In so far as it is allowable to recognize in that which has hitherto been written, evidence of that which has hitherto been kept silent, it seems as if nobody had yet harbored the notion of psychology as a doctrine of the development of the will to power and of the forms it takes (Morphologie und Entwicklungslehre des Willens zur Macht)". *Beyond Good and Evil,* § 23.

[26] 3 *Works,* c. 13.

that point equal, "for there is not ordinarily a greater sign of the equal distribution of anything than that every man is contented with his share". From this equality of ability there arises equality of hope in the attaining of our ends. The life of man, he says, may well be compared to a race that has no other goal nor other garland, than to be foremost.[27] Men are moved by three principal passions, a desire for gain, for safety and for reputation. Those passions are thus the three great causes of quarrels. Hence, the natural condition of man, which is his state in the absence of a superior power to keep him in order, is one of war "of every man against every man". If anyone doubts this let him consider what opinion he has of his fellow citizens when he arms himself for a journey, when he locks his doors, when he locks his chests. Does he not there as much accuse mankind by his actions as Hobbes does by his words? And he does all this when he knows that there are laws and public officials to revenge all injuries done him. For further evidence Hobbes brings forward as examples the life of savages, and the immoral relations which obtain between independent states. He does not hestitate to draw the necessary conclusions of his view of man in his natural state:

> In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short. . . . It is consequent also to the same condition, that there be no Propriety, no Dominion, no *Mine* and *Thine* distinct; but onely that to be every mans, that he can get; and for so long, as he can keep it.

Plato had erected his imaginary community on the basis of his psychological analysis of human nature, and Hobbes' own

[27] *Elements* 36.

views are similar to those advanced by Glaucon in the *Republic.*[28] But the significance of Hobbes' theory is its opposition to the Aristotelian doctrine that "man is by nature a political animal". Twenty-six years before the appearance of the *Leviathan,* Grotius had given a new twist to the Aristotelian view in his principle of sociability (*socialitas*):

> Among the traits characteristic of man is an impelling desire for society, that is, for the social life—not of any and every sort, but peaceful, and organized according to the measure of his intelligence, with those who are of his own kind; this social trend the Stoics called "sociableness". Stated as a universal truth, therefore, the assertion that every animal is impelled by nature to seek only its own good cannot be conceded.[29]

The Horatian view that "just from unjust Nature cannot know" must not for one moment be admitted. Grotius' theory was an effort to solve the problem of the existence of natural law in a state of nature where men were completely independent in their relations. Could individuals be bound by a common law unless at the same time they were united in a community?[30] But a basic postulate of natural law was the assumption that *status naturalis* was the antithesis of *status socialis.* Grotius and his followers held that natural law commanded sociable behavior, and they therefore believed that the state of nature, if it were not yet a state of society, was at least a state of sociability. On this assumption it could be shown that civil society and positive law were outgrowths of an original sociability and the original natural law. However, in Hobbes' theory society was a radical departure from the natural order of human relations; it was an institution founded partly on the passions and partly on reason.

Thus, those Continental followers of Hobbes who insisted that the state of nature did not contain even the germ of the community were advancing a point of view not shared by

[28] *Republic* 358E-359B.

[29] *De Jure Belli ac Pacis Libri Tres* (Kelsey trans. 1925) 11.

[30] 1 Gierke, *Natural Law and the Theory of Society* (1934) 96-105.

Hobbes. How did man ever escape from the melancholy condition in which Hobbes first finds him in nature? There are certain passions, Hobbes answers, that incline men to peace: fear of death, desire of such things as are necessary to commodious living, and a hope through industry to obtain them. Reason therefore suggests convenient articles of peace, upon which men may be drawn to agreement, and dictates to every man for his own good to seek after peace, as far as there is hope to attain it. Those articles of peace are nothing other than the so-called laws of nature.

Legal and speculative philosophy prior to Hobbes had given much thought to distinguishing the various kinds of law. There was not only a *ius naturale,* a *ius gentium* and a *ius civile,* but there was also a *ius naturale prius,* a *ius naturale posterius* and a *ius gentium praevium* and a *ius gentium secundarium.* Hobbes' first step was to eliminate some of the important categories and to revise the general classificatory scheme. He had prepared the way in his discussion of man's condition in a state of nature by maintaining that every man by nature has a right to all things; but, as he at once saw, the right of all men to all things is in effect no better than if no man had a right to anything.[31] His next step was to distinguish law and right, *lex* and *ius.* He held that they were completely opposed to each other. Right is the liberty which the law leaves us; laws are the restraints by which we agree mutually to abridge one another's liberty.[32] "Law is a fetter, right is freedom; and they differ like contraries".[33] This analysis permitted him to make a further advance and to distinguish natural rights (*ius naturale*) from natural law (*lex naturalis*). He defined a natural right as the liberty of each man to use his own power, as he wills, for the preservation of his own life; and consequently of doing anything

[31] *Elements* 55, 109. Hobbes' critics customarily urged this point against his theory of rights, as though he himself were not aware of the contradiction in principle.

[32] *Elements* 148.

[33] 2 *Works* 186.

which in his own judgment he shall conceive to be the aptest means therefor. By "liberty" he means the absence of external impediments. Natural law, however, is inconsistent with this conception. A law of nature he defined as a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or which takes away the means of preserving it, and to omit that by which he thinks it may best be preserved.[34] At this point he repeats his argument that the theory of rights leads to anarchy, and in effect to no rights at all. The argument had at least two purposes in view. First, the theory of rights accounts for the state of nature as the *bellum omnium contra omnes*. By the state of nature Hobbes, of course, does not mean a past condition of mankind. He means the situation that must obtain in the absence of civil power. He regarded men "as if but even now sprung out of the earth, and suddenly, like mushrooms, come to full maturity".[35] Thus, the anarchic condition of the state of nature, which must inevitably be assumed from the hypothesis of natural rights, is transformed into the order of civil society by the logical addition of the natural law element. Second, he stated the natural right concept in the extreme form of the right of all to everything in order to eliminate it from further consideration. He made the individual omnipotent, as Gierke says, with the object of forcing him to destroy himself instantly in virtue of his own omnipotence; then the right would survive only in the form of a *ius ad omnia* left in the hands of a single man, or a single body of men, and would proceed to convert itself into mere naked power. Furthermore, it seems clear that whatever salutary function a theory of natural rights fulfilled, that function could also be deduced from the

[34] 3 *Works* 116-17.

[35] 2 *Works* 109. *Cf.* 3 *Works* 114. Hobbes is here following the Polybian tradition which maintains that government originates when the ferocity and force of primitive man yield to the supremacy of reason. *Histories* VI. 6. 12. He is of course denying the truth of the Aristotelian position that man is by nature a political animal. In other words he thought government was an invention and not a development.

natural law theory set forth by Hobbes. The concept of natural right was therefore unnecessary once the idea of natural law was admitted.

Hobbes also endeavored to eliminate other ideas which he believed were superfluous. In his discussion of the customary division of law into divine, natural and civil he was able to eliminate the divine law because he held that it was identical with the natural law.[36] Again, he disposed of the idea of the *ius gentium* on the ground that its precepts were exactly those of the natural law.[37]

Hobbes arrived at the formulation of his laws of nature by assuming as an objective a condition for man the opposite of the one which obtains in the anarchic state of nature. If the life of man in the state of nature is solitary, poor, nasty, brutish and short; if there is no security to any man, no property and no dominion; and if all this follows from the fact that in that state there is a war of all against all; then it is plain, at least to Hobbes, that amelioration can be found only in the establishment of an antithetical principle. Consequently, Hobbes proposed as the supreme rule,

> that every man ought to endeavor peace as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek and use all helps and advantages of war. The first branch of which rule containeth the first and fundamental law of nature, which is *to seek peace and follow it.* The second, the sum of the right of nature, which is by all means we can to defend ourselves.[38]

This is the basic "general rule found out by reason" from which Hobbes at once deduces nineteen more. However, the reservation of the right of defense (which includes the natural right of each to all things) in the first law which, if fully exercised, would defeat the end Hobbes has in view, leads him immediately to propose the second law for the purpose of

[36] *Elements* 149.

[37] 3 *Works* 342; 2 *Works* 187; 2 *L. Works* 317.

[38] 3 *Works* 117.

closing that gap. In substance, the law obtains that each man by agreement should lay down the right to all things, and be content with so much liberty against other men as he would allow other men against himself. Then, as the cornerstone, his third law provides "that men perform their covenants made"; for without this law "covenants are in vain, and but empty words, and, the right of all men to all things remaining, we are still in the condition of war". Hobbes devoted many pages to the analysis of the idea of contract and reached finally the novel position that "the definition of injustice is no other than the not performance of covenant. And whatsoever is not unjust is just." Thus in a state of nature there can be no injustice. This follows because in a state of nature it is each man's natural right to disregard his promises if to his advantage. Promises are assured only if a coercive power exists to enforce them, and as there is no such power in a state of nature, covenants in that state are meaningless. Justice, which by definition is the performance of covenants, therefore has existence only in the presence of coercive power.

Hobbes next proceeds to the deduction of his remaining laws which, in the main, are general precepts intended to insure order and peace in society; for example, every man should strive to accommodate himself to the rest, and no man should declare hatred or contempt of another. Here Hobbes realized that his rules may have become too tenuous as guides to action. Men would not take notice of them, either because they were "too busy in getting food" or because they were "too negligent to understand". He therefore reduced them all to one simple formula "intelligible to the meanest capacity": *Do not that to another which thou wouldest not have done to thyself.* By stating this precept in a negative form, in contrast with its Biblical positive counterpart, Hobbes emphasized the idea that morality was based on instructed prudence. The laws of nature are "immutable and eternal"; for injustice, ingratitude, arrogance and the rest can never be made lawful, since it can never happen that war should preserve life and peace destroy

it. Nevertheless, the laws of nature are not binding upon men everywhere and at all times. They are obligatory merely in the sense that everyone should desire their observance. For a man that would be modest and tractable, and perform all his promises, while other men were the opposite, would make himself a prey to others, and procure his own certain ruin, which would be contrary to the law of nature which demands self-preservation. It follows as a corollary that the laws of nature are not strictly laws, but "conclusions or theorems concerning what conduceth to the conservation and defense of men." Law, properly speaking, is the word of him that by right has command over others. However, Hobbes is prepared to admit that if the theorems are to be considered as delivered in the word of God then they are properly called laws.

Now Hobbes has here succeeded in stating the important factors which make group life possible under the conditions of an ordered community. Contemporary social thought has carried the analysis much further, and has added a number of elements for the sake of formal completeness which never occurred to Hobbes. At the same time, the reduction of group life by modern thought to the elements of contract, physical basis, homogeneity, structure, energy, and plurality of units is not to be counted altogether a gain, notwithstanding its formal clarity. Hobbes had a more significant end in view than the production of a mere descriptive sociology. His book was intended as a guide to action, and he therefore seized upon the essentials, leaving the rest for the pedagogues. His critics continue to repeat that his laws of nature are negative, that he can hardly be said to have any real belief in social institutions as the instruments and bearers of progressive civilization. He is held to have accepted the Aristotelian maxim that the state comes into being that man may live, but to have ignored the equally vital truth that it continues in order that he may live well. No doubt part of this charge is true. Hobbes was not a hopeful man and he

did not tend to overrate his fellow human beings; he was assuredly no believer in the childish notions of progress which sustain so many men. Nevertheless, he had a clear idea of the state as an instrument of the good life. It was the heart of his whole theory to assert that without the coercive power of the state the life of man was anarchic and brutish, and that the way to the good life was solely through its instrument. His entire problem, as he saw it, was the reconciliation of liberty and authority. He was an apologist for the supremacy of the sovereign, on the ground that peace and security were thus best secured; but he was a Spencerian in his insistence that Government should abstain from regulating the lives of its citizens, except in the most urgent matters. "In a way beset," he writes, "with those that contend on one side for too great liberty, and on the other side for too much authority, 'tis hard to pass between the points of both unwounded."[39]

The Law of the State

In his theory of positive law Hobbes at the outset put his finger unerringly upon a vital distinction. He attempted a separation which, in the Continental languages, is expressed by separate words: *ius—lex; diritto—legge; droit—loi; Recht—Gesetz; derecho—ley*; but which in English is indicated only by the difference between the terms "law" or "the law" and "a law" or "the laws". Thus we speak of corporation law or the law of torts, meaning thereby not any particular law, but the whole body of law prevailing in those fields; we speak also of a law of Congress, or the income tax laws, by which we mean the specific norm or collection of norms. It is the distinction between the general and the particular, and Hobbes saw at once that the primary concern of legal theory was with the former and not the latter. He perceived that law was something more than an aggregate of laws, and that the latter could be subsumed under any sound general theory of the former. There was also an historical reason for his

[39] 3 *Works* v.

choice. In the legal system of his time the courts and not the legislature or ruler were at the center of gravity; their preoccupation was with law and not laws. But in an age such as ours of almost overwhelming legislative activity, or in periods of political absolutism, as during the ancient regime in France or in much of the world today, the common focus of interest may well be laws and not law. In any event, Hobbes declared it was his design not to show what is law here and there; but what is law. He proposed to study the law that men are bound to observe because they are members, not of this or that state in particular, but of a state.[40] He offered many definitions of such law, of which the following perhaps raises the least number of difficulties: "Law, properly, is the word of him that by right hath command over others."[41] This conception was founded on the premise that once the sovereign power had been created through the instrumentality of men agreeing amongst themselves to submit to some man, or assembly of men, voluntarily, that power henceforth was authorized to will in the place of the contracting parties to the end that they might live peaceably amongst themselves and be protected against other men.

For, as Hobbes had already shown, before the institution of sovereign power all men had a right to all things. This necessarily caused discord because no man knew what goods he might enjoy or what conduct he could observe without being molested by his fellow men. Inasmuch as the sovereign power was established to keep the peace, and alone is authorized to do so, it has the whole power to prescribe the rules of property and of conduct which constitute the civil laws, that is to say, the laws of each commonwealth in particular. For

[40] 3 *Works* 250.

[41] 3 *Works* 147. Elsewhere the *Leviathan* contains a more elaborate definition: "Civil law, is to every subject, those rules which the commonwealth hath commanded him, by word writing or other sufficient sign of the will, to make use of, for the distinction of right and wrong; that is to say, of what is contrary, and what is not contrary to the rule." 3 *Works* 251. *Cf.* "Law is the command of that person, whether man or court, whose precept contains in it the reason of obedience." 2 *Works* 183.

the same reasons the sovereign has the right of hearing and determining all controversies that may arise concerning law, either civil or natural, i. e., it has the right of judicature. Without the decision of controversies one man has no protection against the injuries of another; the laws of *meum* and *tuum* are in vain; and to every man remains, from the natural and necessary appetite of his own conservation, the right of protecting himself by his own strength, which is the condition of war, and contrary to the end for which every commonwealth is established.[42] Elsewhere he had expressed the argument almost syllogistically:

> The desires and other passions of men are in themselves no sin. No more are the actions that proceed from those passions, till they know a law that forbids them; which till laws be made they cannot know; nor can any law be made, till they have agreed upon the person that shall make it.[43]

Once men reduced their wills, by a plurality of voices, into one will they created an obligation of obedience to the commands of the sovereign power. Hobbes admitted a few exceptions to this obligation. Men can refuse to kill, wound, or maim themselves; can refuse to accuse themselves of crimes; and when the sovereign is no longer able to protect them from harm they are at liberty to disobey its commands.[44]

This argument, which formed the basis of political thinking from the sixteenth to the eighteenth century, no longer carries persuasion since the rights of governments are now deduced from the needs of society and not from a purely rational conception of the primitive rights of man. Until that fundamental shift in political thinking occurred Hobbes' argument was attacked with regularity by most of his successors; now it is no longer attacked, it is merely in an abandoned state. In its time it was much more than a formal political

[42] 3 *Works* 165.

[43] 3 *Works* 114.

[44] 3 *Works* 204, 208.

doctrine; it was one of the most powerful weapons forged from the fierce social struggles of the seventeenth century. As we look at it today it suffers from two principal weaknesses. First, it ignores the great mediaeval conception of law as the custom of the community, the idea that law was not primarily the expression of the will of the ruler, but that it was the expression of the habit of life of the community.[45] In the actual historical development of the state there is no sharp break between pre-political and political society. A general theory of law is therefore fatally defective unless it accounts for law both as custom and as legislative command. Second, the idea of a social contract is unnecessary, inasmuch as the observance of the contract must depend on something other than the naked contract itself. We must argue that a social ideal—in Hobbes' case, peace—makes it obligatory to observe the contract. But then, that ideal would also act as the basis for the conduct we are insisting upon, and the idea of contract is thus superfluous. At the same time, the idea of contract has some merit. It insists upon the mutuality of social life; and although Hobbes drew from the conception a justification of absolute monarchy, that is not the necessary deduction as is shown by Rousseau's use of it to establish the absolute authority of the will of the people.

From his conception of the nature of law Hobbes was able to deduce a number of consequences which had the effect of disposing, for him at least, of many troublesome questions. The sovereign is the sole source of law, is not subject to it, and alone has the power to abrogate it. Custom obtains the authority of law through the will of of the sovereign signified by his silence. Austin, whose jurisprudence is widely regarded as having taken its point of departure from Hobbes', insisted that custom was not law until it was expressly recognized by the sovereign; but his position on this question was ultimately the same as Hobbes', since he insisted that a com-

[45] 6 Carlyle, *History of Mediaeval Political Theory in the West* (1936) 507.

mand could be tacit.[46] Hobbes held further that the law of nature and the civil law are equal in extent; that the law of a conquered country is that of the victor; that the law can never be against reason, i. e., the reason of the sovereign; finally, that law obliges only those who can take notice of it and therefore does not command the insane, children or animals. It was a vital principle of Hobbes that it belonged to the essence of the civil law to be made known to every man to whom it is directed.[47]

Hobbes at this point saw that his theory of law needed the addition of a further material element if all the gaps were to be closed. There was still the problem of interpretation. His theory in that field, apart from the formal elements which tied it to his doctrine of sovereignty, is in the main the one generally accepted today, although usually on the authority of Austin. He held that it was "not the letter, but the intendment or meaning, that is to say the authentic interpretation of the law (which is the sense of the legislation)"[48] in which the nature of the law consists. From this it followed that the interpretation of all laws depends on the sovereign authority, and its interpreters must be those who owe obedience to the sovereign. "For else, by the craft of an interpreter, the law may be made to bear a sense contrary to that of the sovereign; by which means the interpreter becomes the legislator."[49]

It has sometimes been supposed that a perfection of statement is possible and that in theory there is therefore no need for interpretation. But Hobbes took the flat position, which is now the accepted one, that all laws have need of interpre-

[46] 1 Austin, *Lectures on Jurisprudence* (Campbell's ed.) § 36.

[47] 3 *Works* 259.

[48] 3 *Works* 262.

[49] *Cf.* Hoodly, *Sermon Preached Before the King* (1717) 12: "Whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *he* who is truly the *Law-giver* to all intents and purposes, and not the person who first wrote or spoke them." Quoted, Gray, *Nature and Sources of the Law* (2nd ed. 1924) 102.

tation. He saw that the meanings of almost all words are either in themselves or in their metaphorical use ambiguous, and that they may be drawn in argument to make many senses. No written law, he pointed out, whether it be expressed in few or many words, can be well understood without a perfect understanding of the end for which the law was made. But the knowledge of that end is in the legislator, and to him therefore there cannot be any insoluble knot in the law. He unravels the knot by discovering the ends, or Alexander-wise he cuts it by making what ends he will through the legislative power.

At the center of Hobbes' theory of interpretation was the judge. He ruled out the commentator in the interpretation of both the law of nature and the written law. The opinion of a writer who speaks without the authority of the commonwealth is not law, be it ever so true. Even what Hobbes himself had written in the *Leviathan,* though it be evident truth, is not therefore presently law. Hobbes states precisely that the interpretation of the law of nature is the sentence of the judge constituted by the sovereign authority to hear and determine controversies, and consists of the application of the law to the case. For in the act of judicature the judge does no more than consider whether the demand of the party is consonant with natural reason and equity; and the sentence he gives is therefore the interpretation of the law of nature. That interpretation is authentic, not because it is his private sentence, but because he gives it by authority of the sovereign; whereby it becomes the sovereign's sentence, which is law for that time to the parties pleading. Similarly, the interpreter of the written laws is not the commentator. For commentaries are commonly more subject to cavil than the text and therefore need other commentaries, and thus there will be no end of such interpretation. The interpreter of the written law is no other than the ordinary judge, and his sentence is to be taken by the parties as the law in that particular case. From this analysis to the position of the realist of the present day the step is almost too brief to be measured.

Hobbes accepted the view of the sixteenth century that the courts were not bound to follow precedents, a practice to which we are now returning, whatever may be the present state of our theory. He argued that judges, and even the sovereign, may err in matters of justice; in a subsequent similar case the judge may find it more consonant with justice to give a contrary sentence, and in such instances he is obliged to do so. "No man's error becomes his own law," Hobbes writes, "nor obliges him to persist in it. Neither, for the same reason, becomes it a law to other judges, though sworn to follow it." The law of nature is the eternal law of God, and cannot change or pass away. No precedent, therefore, can establish a rule of law which is contrary to natural equity; nor can an example of a former judge warrant an unreasonable sentence nor discharge the present judge of the trouble of determining the equitable disposition of the case before him. Hobbes put the case of a man, accused of a capital crime, who fled because of the power and malice of his enemies and the corruption and partiality of the judges. Later he is captured, tried and acquitted, but is nevertheless condemned to forfeit his goods because of his flight. To Hobbes this is a manifest condemnation of the innocent, and would therefore be against the law of nature. He admitted that a written law may forbid innocent men to flee, and they may be punished for fleeing; but that fleeing for fear of injury should be taken for presumption of guilt after the man was judicially absolved of the crime, for which there was authority in English law at the time, seemed to Hobbes preposterous.

On the ancient question of whether the letter of the law or the intent of the lawmaker should prevail Hobbes attempted a reconciliation. He agreed that if by the letter of the law is meant merely what can be gathered from the bare words, then a real problem existed because of the notorious ambiguity of words. But if by the letter is meant the literal sense, then the letter and the intention of the law are one. For the literal sense is that which the legislator intended, and should be clear

from the letter of the law. Now the intention of the legislator is always assumed to be just, and a judge therefore ought, if the word of the law does not fully authorize a reasonable conclusion, to fill the omission from the law of nature; or, if the case contains greater difficulties, to withhold judgment until he has received more ample authority. Hobbes put two cases: In the first, the statute provides that he who is put out of his house by force shall be restored by force. A man negligently leaves his house unguarded and, returning, is kept out by force. Hobbes holds that the case is covered by the statute, otherwise there would be no remedy, which would be against the intention of the legislator. Again, the word of the law directs that the judge should decide according to the evidence. A man is falsely accused of an act which the judge himself saw done by another and not by the accused. In this case the letter of the law shall not be followed to condemn the innocent, nor shall the judge give sentence against the evidence of the witnesses because of the rule above stated. The judge should retire in favor of another judge and himself be a witness. In its essentials this theory is identical with a recent carefully formulated proposal to clarify the almost intolerable confusion which obtains in the field of statutory construction.[50] Among its many virtues is the circumstance that it involves a frank recognition in theory of what in large part is the actual practice of the courts. But the practice itself has not always been a happy one, as in the cases where personal predilections of the judges have overridden necessary public requirements.

Hobbes was aware of this weakness in his theory, and attempted to meet it by describing the qualities that make a good judge. He thought that the abilities required in a good interpreter of the laws, that is to say, in a good judge, were not those which had to be possessed by an advocate, namely, a knowledge of the laws. This doctrine has, of course, been accepted in those American states which permit the appoint-

[50] Radin, *A Short Way with Statutes* (1942) Harv. L. Rev. 388, 422.

ment or election of lay judges. Hobbes himself cited the example of the Law Lords in Parliament who, as he said, were not much versed in the study of the law. But the real basis of his doctrine was his theory of sovereignty. He argued that as a judge should not take notice of facts except from witnesses, so also he should not take notice of the law except from statutes and constitutions of the sovereign, either alleged in the pleading or declared to him by those having sovereign power to do so. However, there were certain positive qualities that a judge should possess. He should have a sound sense of justice, should not be swayed by hope of reward or preferment, should be able in judgment to divest himself of fear, anger, hatred, love, and compassion, should be diligent and patient in hearing causes, and should have the memory to retain, digest and apply what he has heard.

Theory of the Common Law

At about the age of seventy-six Hobbes undertook an analysis of the English common law. Aubrey had urged him to embark upon the task, but he had replied that he could not count upon life enough. However, under the stimulus of a gift from Aubrey of Bacon's *Elements of the Common Laws of England* he wrote out the *Dialogue between a Philosopher and a Student of the Common Laws of England.*[51] It belongs to the period when Hobbes was under investigation by a parliamentary committee as a suspected heretic and feared for his own safety. At that time he wrote an essay on the English law of heresy to prove that he could not be legally burnt, the argument of which he restated in the *Dialogue.* But the primary object of his study of the common law was to refute the theories of the constitutional lawyers, particularly those founded on the great mediaeval conceptions advanced by Coke. He believed that the limitations on the royal prerogative, such as the denial of the sovereign's right of militia, were among the main causes of the catastrophe of the Rebellion,

[51] 6 *Works* 3 *et seq.*

and that a good share of the blame was attributable to the ideas of the constitutional lawyers, which needed correction from the point of view of the new doctrine of sovereignty.

The general theory of the *Dialogue* is merely an application of the doctrine of the *Leviathan* to the specific case of the common law. There is no advance in theory, but the analytical skill with which Hobbes tackled concrete problems contributed in no small measure to his rescue in the nineteenth century from the solitary and opprobrious position to which the critics of the two preceding centuries had assigned him. At the outset he disputed Coke's assertion that reason is the life of the law and that the common law itself is nothing else but reason. It did not help to say that the reason which is the life of the law is artificial and not natural. Hobbes understood that knowledge of the law is gotten by much study, as in other sciences, and that such knowledge is an art. He held that it is not wisdom, but authority, that makes a law. He therefore rejects the view of Bracton and Coke that "*lex est sanctio justa, jubens honesta, et prohibens contraria*", and defines it instead as "the command of him or them that have the sovereign power, given to those that be his or their subjects, declaring publicly and plainly what every of them may do, and what they must forbear to do." [52] Thus it followed that no record of a judgment was a law save only to the party pleading,[53] and that custom by its own nature could never amount to the authority of a law.[54] He interpreted Coke's use of the phrase "legal reason" to mean that the reason of a judge, or of all the judges, together without the king, is that *summa ratio*, and the very law; and he denied that the proposition is true.[55] No judge without the authority of the king can make law; but a judge possessing the authority can give an authentic judgment, which thereby becomes the sov-

[52] 6 *Works* 26.

[53] 6 *Works* 54.

[54] 6 *Works* 62.

[55] 6 *Works* 5.

ereign's, and " is law for that time to the parties pleading." [56] His conception of case law as binding only on the parties themselves permitted him to argue against the authority of precedents, which he attempted also to meet on the additional ground that, if carried back far enough, would make all the justice in the world depend upon the sentence of a few learned or ignorant men.

Throughout the *Dialogue* Hobbes maintained a running fire of criticism against Coke's views. He observed that Coke everywhere in the *Institutes* endeavored to diminish the king's authority and to insinuate his own opinions among the people for the law of the land;[57] that Coke in maintaining that judicature belonged only to the judges failed to distinguish between a transfer and a commitment of power;[58] that it is impossible to understand Coke's assertion that to cause the death of a man and to declare it is all one thing;[59] that Coke's understanding of unintentional homicide is entirely his own invention;[60] that his definition of theft leads to absurdities;[61] that his discussion of heresy is defective inasmuch as it omits the main point, i. e., what it is;[62] that Coke's constant citation of ancient authorities does not represent his own reading, but are quotations at second-hand;[63] that he misunderstood his common-law authorities;[64] and, finally, that in no other English legal writing had Hobbes encountered weaker reasoning than in the *Institutes*.[65] Putting aside

[56] 3 *Works* 263; *Cf.* 6 *Works* 14.

[57] 6 *Works* 62.

[58] 6 *Works* 52.

[59] 6 *Works* 75.

[60] 6 *Works* 87.

[61] 6 *Works* 92.

[62] 6 *Works* 96.

[63] 6 *Works* 144.

[64] 6 *Works* 129.

[65] 6 *Works* 144.

the political and personal elements in Hobbes' criticisms, the principal defects noted in Coke's exposition are defects of the law itself, that Coke had inherited. That Coke failed to perceive numerous instances in which the law stood in need of modernization is undoubtedly a weakness, and that Hobbes, with the tremendous power of the analytical method as a weapon, was on sound ground in exposing it, cannot be doubted. Nevertheless, if Coke was wrong in insisting that the life of the law is reason, Hobbes was equally in error in urging that it is authority. Hale, who took up the cudgels for Coke, put his finger on the flaw in Hobbes' theory when he observed that philosophers generally make "the worst Judges that can be, because they are transported from the Ordinary Measures of right and wrong by their over fine Speculacions, Theoryes and distinctions above the comon Staple of humane Conversations." [66] Hale's criticism could at most be taken as a prophecy of the logical excesses to which the followers of Hobbes, Bentham and Austin carried the refinements of analytical jurisprudence. Hale displayed extraordinary perception in isolating the flaw in Hobbes' theory of law when viewed as a rigid system. Actually, however, it was Hobbes, the authoritarian, who allowed for the tolerance of human affairs, and it was Coke, the rationalist, who, on logical grounds, wished to punish the innocent [67] and who maintained that growing corn and grain could not be the subject of larceny [68] because they were annexed to the realty.

Conclusion

Hobbes' great contribution to legal philosophy was his justification of the criterion by which analytical jurisprudence since his day has identified law. He held that the legal order derived its authority from politically organized society, and that a law was a rule for which the state had commanded obe-

[66] Hale's tract against Hobbes is printed as Appendix III in 5 Holdsworth, *History of English Law* (1924) 499.

[67] 6 *Works* 137; 1 Coke, *Instit.* (5th ed. 1656) 373.

[68] 6 *Works* 92; 3 Coke, *Instit.* (1648) 109.

dience. In thinking of law he thus took his departure from neither the ethical nor the rational, and his ideas in that respect culminated in the Austinian doctrine that no positive law can be legally unjust. He admitted the validity of ethical rules and conceded that they were anterior to the establishment of the state. But he insisted that if they were to be obeyed generally they had to be commanded by a properly established authority possessing adequate force to compel obedience. Thus he made the hallmark of the state the criterion for the identification of law, and in doing so repudiated the theory that law was the habit of life of the community, an idea which in English law found expression in Bracton's theory of law as primarily custom. In the hands of the later analytical jurists Hobbes' idea became one of the most powerful weapons for the analysis of legal phenomena ever devised. Though it has numerous rivals today, it is still employed with fruitful results and seems historically to be at the root of the contemporary realist's conception that law is whatever is done officially about disputes. No doctrine has been so continually criticized and none has showed such tenacity. Every young intellectual, Warburton [69] pointed out in the eighteenth century, "would needs try his arms in thundering upon Hobbes's steel cap," an observation which Holmes [70] was to repeat for our own time but with the addition that he thought "the old pot will serve for a few days longer." That the recent trends towards state absolutism, both in practice and in theory, are in the main current of Hobbes' speculation scarcely needs to be remarked. If those trends continue, his basic legal ideas, in one form or another, will continue to attract a large share of legal speculation.

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[69] *Divine Legation of Moses* (Hurd's ed. 1811, IV. 31).

[70] Holmes, *Pollock Letters* (1941) 30.

THE MEETING OF THE ROMAN LAW AND THE COMMON LAW IN THE PHILIPPINES *

DURING the Pre-Spanish period the Filipinos were living under a native system of customary laws. They were fragmentary and unorganized; not general but localized, hence diverse. There was no attempt at systematization. Notwithstanding these defects they were not entirely devoid of good qualities. We must not judge them by twentieth-century standards.

The discovery of the Philippines by Magellan on March 16, 1521, marked the beginning of a new era in the history of Philippine law. It meant the introduction of a system of laws which were not based on the customs and usages of the people. This was accomplished by the extension to the Philippines of the laws and codes of Spain either expressly by Royal decree or by implication.

Among the collections and compilations of Spanish laws which were probably in force in the Philippines before the movement for the scientific codification of the laws of Spain began, were: the *Fuero Juzgo,* the *Fuero Real,* the *Siete Partidas, El Ordenamiento de Alcala, Las Leyes de Toro,* the *Nueva Recopilación,* the *Recopilación de las Leyes de las Indias,* and the *Novisima Recopilación.*

The modern Spanish codes which were extended to the Philippines and were in force at the time of American occupation were the Penal Code, the Code of Commerce, the *Ley Provisional,* the Code of Criminal Procedure, the Code of Civil Procedure and the Civil Code. In addition to these codes the following special laws were also extended to the Philippines: the Marriage Law of 1870, the Mortgage Law, the Mining Law, the Law of Waters of 1866, the Copyright

* Paper read at the meeting of the Riccobono Seminar of Roman Law in America, Washington, D. C., March 28, 1946.

Law, the Railway Law, the Notarial Law of 1862, the Law of Foreigners for Ultramarine Provinces, and the Spanish Code of Military Justice.

The victory of Admiral Dewey in the battle of Manila Bay on May 1, 1898, followed by the capture of Manila on the 13th of August of the same year and the formal ratification of the Treaty of Paris which transferred the sovereignty over the Philippines to the United States, is another landmark in the history of Philippine jurisprudence. It marked the inception of a new tendency in the development of Philippine law. Henceforth, Anglo-American juridical thought was to play a very important role in the evolution of Philippine jurisprudence.

On the advent of American occupation the political law of the Philippines—that is, the laws regulating the relations sustained by the inhabitants to the sovereign—was almost totally abrogated. Only such portions of it as the United States authorities expressly declared should continue in force were saved. On the other hand, such municipal laws of the Philippines as affected private rights of persons and property, regulated local institutions, and provided for the punishment of crimes, were all considered as continuing in force, pursuant to the instructions of President McKinley to General Merritt, Commander of the Army of Occupation. It was further ordered that these laws be administered through the ordinary tribunals substantially as before occupation. President McKinley said:

> The main body of laws which regulate the rights and obligations of the people should be maintained with as little interference as possible. Changes made should be mainly in procedure, and in the criminal laws to secure speedy and impartial trials and, at the same time, effective administration and respect for individual rights.

In other words, the Spanish codes and special laws which were then in force were perpetuated, to the same extent as

if the Congress of the United States had enacted new laws for the Philippines modelled upon those Spanish statutes, but the judicial decisions of the Spanish courts based on those statutes were not to be considered binding as precedent. This retention of the local private law was merely in accordance with the principles of international law in that regard. However, by the mere fact of the change of sovereignty, all portions of that statute law which might be termed political law were abrogated immediately by such change of sovereignty. Also, all Spanish laws, customs, and rights of property inconsistent with the Constitution and with American principles and institutions were thereupon superseded.

The various Spanish codes which were in force in the Philippines on the transfer of sovereignty to the United States have suffered different fates. The Civil Code has been amended but very slightly. This fact is eloquent testimony to the merit of that monumental work and a tribute to the excellence and magnificence of the Roman law on which it is based.

An American writer has said of the Spanish Civil Code:

> This is a model of concise, comprehensive, and systematic codification. Divided into four books it follows, in the main, the arrangement of Justinian's Institutes and treats, in a volume of little more than three hundred pages, the subjects of Domestic Relations, Property, Wills, Decedents' Estates, Contracts, etc., whose exposition in our law requires more than a half-dozen ponderous tomes. Nor is this treatment of the Spanish Code superficial. By skilfully adopting the phraseology of the Roman Code and carefully studying the art of condensation the Spanish codifiers have been able to express the principles of their substantive law in a very small compass.[1]

The Code of Commerce has been reduced to a skeleton code because of repeated amendments with the end in view of introducing up-to-date business and economic concepts.

[1] Charles S. Lobingier, "Blending Legal Systems in the Philippines," *Law Quarterly Review*, 21 (1905), 401.

The Penal Code has been revised and re-enacted as the Revised Penal Code, Act No. 3815.

The Code of Criminal Procedure and the Code of Civil Procedure were completely repealed by the new Code of Criminal Procedure, G. O. No. 58, and the New Code of Civil Procedure, Act No. 190, respectively—both of which being patterned after American models.

It is needless to say, therefore, that at least in so far as the substantive law is concerned the Philippine legal system is saturated with Roman law and civil law influence. In some cases only the Roman principle is contained, couched in modern terminology; in other cases the Roman text itself is perpetuated.

I do not possess the capacity for, nor does time permit, the enumeration and discussion of all these cases of Roman influence. I hope I can render partial justice to this paper if I cite a few typical instances by way of example.

In the realm of the law of Persons and Family Relations the following illustrations may be mentioned.

A survival in a limited sense of the Roman law doctrine of the wife's subordination to the authority of her husband—*manus*—is found in the following provisions of the Spanish Marriage Law of 1870:

(1) The wife must obey her husband, live with him, and follow him when he changes his domicile or residence except when he removes to a foreign country.

(2) The wife cannot make contracts, or acquire property by will or descent, without the permission of her husband, except as provided by law.

(3) The wife cannot sue or be sued alone except in some specified cases.

(4) The wife cannot publish any literary or scientific work of which she may be the author without the husband's consent or in its default a judicial authorization.

Maine considers the Roman doctrine of *patria potestas* as "the first and greatest landmark in the course of legal his-

tory." The Roman family in ancient times has been likened to an *imperium in imperio* with the *paterfamilias* as absolute ruler. Under the XII Tables his *patria potestas* included the power to sell, expose, or put to death his children.

Under our law the authority of the parents over their children is not quite so extensive as the *patria potestas* of the Roman *paterfamilias,* but it is not very feeble either for it includes the right: (a) to keep the children in their company; (b) to correct and punish them moderately; (c) to approve or disapprove their adoption; (d) to grant or withhold consent to their marriage if they are below twenty years in the case of males, and eighteen years in the case of females; (e) to disinherit them for cause; (f) to defend them from unlawful aggression; (g) to demand support from them in certain cases. Furthermore, it is explicitly provided that "the father, or in his default the mother, may exercise parental authority over their unemancipated legitimate children and children are bound to obey their parents while subject to such authority and at all times to treat them with respect and reverence" (Art. 154). It must be noted that all these rights of the parents refer only to the person and not to the estate of the child. The parents are not now entitled to the administration of the child's estate unless so ordered by the court. If they are so ordered they have the power of administration not by virtue of their *patria potestas* but by virtue of the judicial appointment as guardians of the estate of the child.

Following the imperial Roman law it is provided in the Civil Code that natural children—i. e., children born out of wedlock of parents who at the time of the conception of such children could have married—may be legitimated by the subsequent marriage of the parents.

In the field of the Law of Property the Civil Code retains the Roman classification of things into public and private, movable and immovable, consumable and non-consumable, corporeal and incorporeal.

According to Paragraph 1 of Art. 339 of the Civil Code,

> Property of public ownership is—(1) that devoted to public use, such as roads, canals, rivers, torrents, ports and bridges constructed by the State, riverbanks, shores, roadsteads, and that of a similar character.

The provision is reminiscent of Book II, Title I, Paragraphs 1, 2, 3 and 4 of the Institutes of Justinian.

The distinction between mere *detentio* and legal possession is succinctly pointed out in Art. 430:

> Natural possession is the holding of a thing or the enjoyment of a right by any person. Civil possession is such holding or enjoyment, coupled with the intention on the part of the possessor of claiming the thing or right as his own.

A clearer statement of the concepts of *corpus* and *animus* is difficult to find.

The elements of *dominium—jus utendi, jus fruendi, jus abutendi, jus disponendi,* and *jus vindicandi*—are all embodied in Art. 348 which defines ownership as

> the right to enjoy and dispose of a thing without further limitations than those established by law. The owner has a right of action against the holder and the possessor of the thing to recover the same.

The Roman modes of acquisition whether *jure naturali* or *jure civili* are recognized in Art. 609 which provides that

> ownership is acquired by occupancy. The ownership of property and other rights therein are acquired and transmitted by law, by gift, by testate or intestate succession, and in consequence of certain contracts, by tradition; they may also be acquired by prescription.

It will be noted that accession is not included therein. The reason for this is that in our law accession is regarded as a consequence of ownership, i. e., as one of the rights flowing from ownership, and not as a mode of acquiring ownership.

In his Institutes, Book II, Title I, Paragraph 12, Justinian says:

> Wild beasts, birds, fish and all animals, which live either in the sea, the air, or on the earth, so soon as they are taken by any one immediately become by the law of nations the property of the captor. . .

This is reflected in Art. 620 of the Civil Code which reads as follows:

> Things which by their nature are susceptible of appropriation, but which have no owner, such as living creatures which may be taken by hunting or fishing, hidden treasures, and abandoned personal property, may be acquired by occupancy.

According to the Institutes (Book II, Title I, Paragraph 39),

> the Emperor Hadrian, in accordance with natural equity, allowed any treasure found by a man in his own land to belong to the finder, as also any treasure found by chance in a sacred or religious place. But treasure found without any express search, but by mere chance, in a place belonging to another, be granted half to the finder and half to the proprietor of the soil. Consequently, if anything is found in a place belonging to the Emperor, half belongs to the finder, and half to the Emperor . .

The same idea is restated in clearer language in Art. 351 of the Civil Code, thus:

> Hidden treasure belongs to the owner of the land in which it is found. Nevertheless, when the discovery is made on property belonging to another or to the State, and by chance, one half thereof shall be awarded the finder. . .

Thesaurus, says Paul (D. 41.1.31.1), *est vetus quaedam depositio pecuniae, cujus non extat memoria, ut jam dominum non habeat*. "By Treasure," says the Civil Code (Art. 352), "is understood, for legal purposes, hidden and unknown deposits of money, jewels, or other precious objects, the lawful owner of which is unknown." Any similarity between the two provisions is surely not coincidental.

According to Roman law ownership cannot be transferred by mere agreement—*non nudis pactis, sed traditione dominia rerum transferuntur.* The agreement, even though it be in the form of a legal contract, serves only as an expression of the intention of the parties and does not effect the transfer of ownership from one party to the other. To bring about the transfer of ownership there must be tradition or delivery besides. This doctrine is not to be interpreted as meaning that a contract without delivery has no effect whatever. The contract, if it meets all the requirements of the law, may be perfected and therefore enforceable, but notwithstanding, it does not of itself cause the transfer of ownership. The perfection and enforceability of the contract are one thing, and the transmission of the ownership is another. In other words, the contract creates only a personal right or right *in personam,* against the promisor; it does not create a real right, or right *in rem* to the thing which is the subject of the contract. In conformity with this doctrine the Philippine Supreme Court has repeatedly held that the ownership of movables cannot be transferred to the prejudice of third persons except by delivery of the property itself, and a sale without such delivery gives the would-be purchaser no rights in said property other than those of a creditor.

Under accession there are provisions in the Civil Code governing: alluvion; avulsion; abandoned riverbed; islands formed in rivers; building, planting and sowing; adjunction; commixion; and *specificatio.* The codal provisions are faithful counterparts of the corresponding Roman law rules. For instance, in Paragraph 29, Title I, Book II of the Institutes we find that *omne quod inaedificatur solo cedit;* Art. 358 of the Civil Code states:

> Whatever is built, planted, or sown on another's land, and any improvements or repairs made on it, belong to the owner of the land. . .

The Civil Code treats of the real rights of usufruct, use and habitation separately from the subject of servitudes, in-

cluding under the latter only praedial servitudes, to wit, right of way, servitudes of party walls, of light and view, drainage of buildings and servitudes relating to waters.

With respect to usufruct, Art. 467 of the Civil Code says:

> Usufruct gives a right to enjoy another's property under the obligation of preserving its form and substance, unless the title creating it or the law provide otherwise.

How well has this Article preserved the form and substance of its progenitor (Institutes, Book II, Title IV, Pr.), which says:

> Usufruct is the right of using, and taking the fruits of things belonging to others, so long as the substance of the things used remains. . .

As to the law of inheritance, formerly in the Philippines succession was governed by the Civil Code in all its aspects, but after the change of sovereignty following the American occupation, the provisions of the Civil Code relating to the making of wills and the administration of estates, both testate and intestate, were repealed by the corresponding provisions of the Code of Civil Procedure, Act No. 190. The latter code, however, did not repeal the provisions of the Civil Code relating to the substantive rights of persons in succession.

In the Roman law by institution of heir is meant the declaration who is to be heir, that is, who is to carry on the legal existence, the *persona*, of the testator. The institution of the heir was the all-important part of the will, since without it there would be no one to continue the legal personality of the testator and consequently no one from whom the other dispositions in the will could derive force. The institution of the heir was the head and foundation of the will—*veluti caput atque fundamentum totius testamenti;* all the other dispositions were merely accessories to it, or to be more precise, only conditions imposed on the heir. If the former was wanting the latter fell. Since the heir was the continuation of the legal personality of the testator he acquired the totality of

the rights and obligations of the latter. Their two estates were fused, and if the liabilities of the testator exceeded his assets the heir was answerable with his own property.

The notion that the heir was the necessary prolongation of the *persona* of the testator was adopted by the Spanish law. The Civil Code provides that a person is called an heir when he succeeds under a universal title, and a legatee when he succeeds under a particular title. This distinction was swept away on the passage of the Code of Civil Procedure, Act No. 190. Under this law "heirs" are the relatives of a person who inherit his property when he dies intestate. Those who succeed under a will—whether relatives or not—are "devisees" if they inherit immovable property, or "legatees" (in a narrower sense of the word) if they inherit movable property. At present, therefore, all successors *mortis causa* stand in the same position as the legatees in the Roman law and Spanish law. They are not liable for the debts of the decedent beyond his estate.

Justinian defined a legacy as "a kind of gift left by a deceased person." According to the Civil Code, as explained above, a legacy is some determined property or portion of the testator's estate which he directs to be separated from the inheritance and to be given to some one. Under this system it is incumbent upon the heir to comply with the testator's direction. But now that there is no longer an heir in the Roman law sense of the word, it seems that the duty to carry out the legacies devolves upon the executor. To the uninitiated it may seem very strange that our law, like the Roman, permits the testator to give as a legacy property belonging to a stranger. Formerly the heir, and now probably the executor, is obliged to acquire the thing from the stranger and deliver it to the legatee, and if this is not possible, to give the latter its value.

The Law of Obligations and Contracts covers a very large portion of the Civil Code. Out of 1976 Articles, 888 deal with this subject. They are permeated with Roman principles.

The next to the opening article (Art. 1089) provides:

> Obligations are created by law, by contract, by quasi-contract, and by unlawful acts or omissions or by those in which any kind of fault or negligence occurs

—a reprint of Paragraph 2, Title XIII, Book III of the Institutes which says that obligations arise *ex contractu,* or *quasi ex contractu, ex maleficio,* or *quasi ex maleficio.*

The Roman doctrine of liability on account of *dolus, culpa,* and *mora,* is reflected in Art. 1101 which provides:

> Any person who is guilty of fraud, negligence or delay in the fulfillment of his obligations, or who in any manner whatsoever shall fail to comply with the terms thereof, shall be liable for any damage caused thereby.

Philippine law distinguishes between *culpa contractual* and *culpa aquiliana.* The former is a breach of a pre-existing duty arising from contract or quasi-contract; the latter is negligence independent of contract.

The Institutes in Book III, Title XV, Paragraph 2 reads: *Omnis stipulatio aut pure aut in diem aut sub conditione fit.* The Civil Code likewise recognizes pure or simple obligations, obligations with a term, and conditional obligations. In the first the obligation is at once due and demandable; in the second it is due but not demandable until the day arrives; in the third it is neither due nor demandable until the condition is fulfilled.

A word about *causa.* The treatises of text-writers on the subject of *causa* or cause present a bewildering picture. In the first place, they are divided into two camps, one, the causalists, maintaining that there exists an absolute necessity for *causa* in contract; the other, the anti-causalists, denying it and describing it as a " juristic figment." In the second place, those who uphold the theory that cause is required are not quite agreed as to what its real nature is. The state of confusion is aggravated by the attempt of some to identify the " consideration " of the English law with the *causa* of the civil law. Be that as it may, the first question is not a problem

in our system, for the statute categorically provides that "contracts without cause or with an illicit one produce no effect whatsoever."

With respect to quasi-contracts, the Civil Code retaining the Roman concept in its unadulterated state defines them (Art. 1887) as

> licit and purely voluntary acts which create an obligation on the part of the actor in favor of a third person, and, at times, a reciprocal obligation between the parties concerned.

Illustrations of obligations *quasi ex contractu* in the Civil Code are: *negotiorum gestio* and *solutio indebiti.*

In the Philippine legal system there is no separate department called the law of torts in the same way that there is a branch known as the law of contracts, or the commercial law. However, Art. 1902 provides:

> Any person who by an act or omission causes damage to another by his fault or negligence shall be liable for the damage so done.

It is interesting to note the striking similarity between the wording of the Institutes in Book IV, Title V, Paragraph 1 and that of Art. 1910 of the Civil Code. The former reads:

> So, too, he who occupies, whether as proprietor or gratuitously, an apartment, from which anything has been thrown or poured down, which has done damage to another, is said to be bound *quasi ex maleficio. . .*

The Civil Code provides:

> The head of a family dwelling in a house, or in a part of the same, shall be liable for any damages caused by the things which may be thrown or which may fall therefrom.

The foregoing is an inadequate attempt to indicate to what extent the Roman law and the modern civil law have influenced the Philippine legal system. It remains now to show in what ways Anglo-American thought has affected Philippine law.

To my mind, the most important and lasting contributions of American institutions to Philippine law are:

(1) In the field of public law, the republican form of government with the traditional separation of powers and a complete bill of rights. Also, the principle of constitutionalism which according to Beard embraces four necessary elements: (a) the great rules for governing ourselves shall be made by the process of proposal, discussion and popular decision at the polls; (b) the powers of all officials shall be restrained by fundamental rights reserved to the people; (c) all officials exercising power shall be chosen by the voters directly or indirectly; and (d) directly elected persons, having limited powers for a term of years, shall be automatically subjected to review at elections held periodically.

(2) With respect to the structure of the government, the conception of an independent judiciary. Another of the priceless contributions of the American regime to our government is the implantation in the Philippines of the doctrine of judicial supremacy, according to which the judiciary, a co-ordinate branch of the government, becomes the particular guardian of the terms of the written constitution.

(3) In the branch of adjective law, a scientific and simplified system of procedure. The substantive private law of the Philippines, based on the Spanish codes, was found to be well suited to the conditions of the people and was left unchanged. But in the matter of procedure there was a general desire for reform.

(4) In regard to commercial law, a set of up-to-date business laws based on modern economic life.

Opinions differ as to the present character of the Philippine legal order—whether Romanesque or Anglican, a blend of the two or a composite. I venture the following conclusions:

First, the greater bulk of Philippine law is Romanesque.

Second, there has been an increasing infiltration of common-law principles into Philippine jurisprudence, due to several causes, to wit: (a) the automatic replacement of the

Spanish political law by the American political law, upon the transfer of sovereignty; (b) the continued drawing from American patterns by the Philippine Legislature in the enactment of new statutes; (c) the growing reliance by the bar and the bench on American decisions in the application and interpretation, not only of American-derived statutes, but also of the old statutes of Spanish origin; (d) the imitation of the system of American legal education by the law schools of the Philippines. The last-mentioned cause is by no means the least in effect. It must be remembered that the revival of Justinian Roman law in all Europe in the twelfth century was largely due to the lectures of one law professor at the University of Bologna.

Third, despite the rapid increase of the common-law element, the Romanesque portion of Philippine law still predominates and will continue to predominate. It is too sturdy to be relegated to the background. " Law is a tenacious plant," says Lord Bryce, " even harder to extirpate than language."

Fourth, although many common-law provisions and principles are being literally grafted on the law tree of the Philippines, the case-law method of adjudication, which is a condition *sine qua non* of the common-law system, is not adopted. The doctrine of *stare decisis* does not obtain in the Philippines in the same sense that it obtains in common-law countries. Precedent is only evidence of the law in the Philippines and not the law itself; consequently, the Philippine legal system can never be a common-law system, in the strict sense.

Be that as it may, the noteworthy fact is that the two greatest world legal systems, the civil law and the common law, have met and found a common ground in the Philippines. In the words of Justice Malcolm,

> There is in the Philippine Islands a unique legal system, in which the two great streams of the law—the civil, the legacy of Rome to Spain, coming from the west, and the common, the inheritance of the United States from Great Britain, amplified

by American written law, coming from the east—have met and blended.

And Judge Lobingier concludes:

"Finally, the experiment has demonstrated the feasibility of blending segments of the civil and comon law—the two systems which divide the civilized world—thus confirming the statement that at root the two systems are really one and bringing appreciably nearer the day dreamed of by Rome's greatest orator and advocate, when "*Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore una lex et sempiterna, et immortalis, contenebit.*"[2]

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[2] "Civil Law Rights through Common Law Remedies," *The Juridical Review*, 20 (1908-9), 107.—Cic. *de rep.* 3.22.33.

Book Reviews

The Roman Law of Sale. Introduction and Select Texts. By F. de Zulueta. Oxford: At the Clarendon Press, 1945. Pp. xii, 265. $6.50.

Roman law teaching in English universities is based on the principle of giving the student first-hand acquaintance with the more important among the sources. Accordingly, British scholars have published books containing the text of select titles of the *Digest*, accompanied by more or less detailed comments, for use in the classroom. The shortcomings of this approach, from the point of view of scientific treatment of the Roman law, were pointed out by Ernst Levy (*Ztschr. Sav. St., Rom. Abt.* 52 [1932] 533f.). In partial acknowledgment of Levy's objections, Professor de Zulueta has, in the book under review, chosen a different way of fulfilling the desired end. He has done away with the too mechanical method of rendering whole titles, and only these titles, and has instead prepared an anthology of texts taken from various parts of the *Digest* as well as from other sources. Long selections from titles immediately relevant (in books XVIII, XIX, XXI) are supplemented by passages taken from other titles, by substantial excerpts from the *Codices Theodosianus* and *Justinianus* and other writings, both literary (Cato, Varro, Cicero, Gellius) and legal (Gaius, Paulus, *frg. Vat.*, Justinian's *Institutes*), and by conjectural texts of the *formulae empti, venditi, redhibitoria,* and *quanti minoris.*

This new experiment deserves unqualified praise. The collection, while not imposing on the student the need of reading a great deal of irrelevant or unimportant passages, gives him a fairly complete view of the topics discussed by pre-classical and classical Roman jurists and by Justinian in connection with the transaction of sale, of their methods of approach, and of their solutions of problems arising therefrom. In addition, comparative studies are encouraged by reprints of the texts of common law sources (the English *Sale of Goods* and *Factors Acts*, the American *Uniform Sales* and *Uni-*

form Conditional Sales Acts) and of articles of the French Civil Code, while relevant passages of the German Civil Code are indicated in the preface. Foreign language texts are accompanied by English translations which are free enough to avoid cumbersome diction but always close enough to render adequately the legal meaning of the original.

Pages 1-59 of the volume are taken up by the author's own introduction in which he gives a concise but rather detailed survey of the subject. In accordance with the book's purpose of serving as a guide to students who are interested in Roman law chiefly as a basis for their study of modern civil law, the author has, as a whole, refrained from historical discussions and presented the principles of the Roman law of sales in their mature form as reached under the later classics and under Justinian. This does not mean, however, that either the history of the institutions or the results of modern research, aimed at an elucidation of the evolution of rules and at pointing out the differences between the classical and the Justinian approach and solutions, have been neglected. The nature of the transaction before the development of the consensual contract and after-effects of earlier forms in the period of the latter, as well as some Greek influences, are given due attention. The question of interpolations does not play so dominant a part as it would in a German or Italian book, but alteration of texts is noted when required by the purpose of the presentation.

Nobody will expect to find in a book of this kind new theories or lengthy dealing with controversial issues. However, his pedagogical aim has not prevented the author from making brief but considered statements on many questions under debate. It is therefore inevitable that readers may at times disagree with the author. It would be tedious, however, to dwell at length on points of disagreement[1] or other criticisms that might possibly be raised,[2] for

[1] To mention only two points which occurred to the reviewer: (1) With regard to *Cod. Just.* 4.21.17.2 and *Instit.* 3.23 *pr.*, the author (p. 24) rejects the common opinion that under Justinian's regulation, in contrast with the ordinary Roman law, forfeiture of the *arrha* was the sole penalty for breach of contract and states his belief that, although such may have been the actual effect of the arrangement in the case of a substantial *arrha*, which covered the damages, no fundamental deviation from traditional Roman principles was intended by the emperor. But it would seem to be more correct here to recognize one of the cases in which Justinian fitted Greek customs and conceptions into his basically Roman system, without being bothered by the

they could under no circumstances reflect on the usefulness of this book. It provides a lucid presentation of, and a convenient collection of source materials for, a subject of Roman law, the lasting importance of which is indisputable and has in this book again been brought out by frequent comparison with English law and occasional references to French and German law. It is to be hoped that it will find widespread use in this country, if and when the value of the Roman law for legal instruction will be realized.

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The Journal of Juristic Papyrology (vol. I nr. 1). Edited by Raphael Taubenschlag. New York: Polish Institute of Arts and Sciences in America, 1946. 155 pp. $3.00.

This new journal should meet with a hearty welcome from all readers of SEMINAR. It is intended to become a central organ for all research aimed at the elucidation of the legal system of Greco-Roman Egypt, including the reviewing of books and reports on current literature pertaining to the field. Its scope, it is true, is limited, as the title indicates. But this specialization is not to be understood in a narrow sense. Professor Taubenschlag, in his Introduction, stresses the fact that the *Journal of Juristic Papyrology* is not meant to be "an exclusive journal for jurists." Nobody will deny the usefulness of such an enterprise, in view of the special place legal papyrology may claim within the whole Papyrology, as well as among the various branches of Ancient Legal History.

The issue contains four articles. Taubenschlag himself discusses *Customary Law and Custom in the Papyri* (pp. 41–54). A. E. R.

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doctrinal inconsistency involved in such procedure. Neither the text of the constitution nor that of the *Institutes*—both expressly refusing to distinguish between oral and written contracts—admits of the author's interpretation that the emperor had in mind only pre-contracts.—(2) The principle that the seller's obligation does not include a duty to transfer full title seems to follow rather from the original separation of his liability for *auctoritas* than from the practical reasons suggested by the author (p. 37), to wit, the frequency of sales for mere bonitarian ownership.

[2] It may be regretted that the author has refrained from giving samples of actual contracts of sale. The only deed reprinted by him (p. 76f.) is Bruns, *Fontes* (7th ed.) I 328, and this only for the reason that the document contains an elaborate text of the aedilician stipulation.

Boak (*A Fourth Century Petition for Relief from Extortion;* pp. 7–12) edits, with brief comments, the unpublished *P. Cair. Inv.* 57049. Three separate papers are combined in A. Berger's *Miscellanea Papyrologica* (pp. 13–40). The first purports to give a new interpretation of the Latin *P. Mich. Inv.* 4703 (ed. H. A. Sanders, *Proceed. Amer. Philos. Soc.* 81 [1939] 581ff.; cf. R. O. Fink, *Trans. Amer. Philol. Ass.* 72 [1941] 109ff.); Berger proposes to understand the fragmentary text as a wife's receipt for the restitution of the dowry. In his second paper Berger points out that ἀναλημφθέντες in *BGU.* I 140, line 24, means simply *born;* and in his third note he comments on *P. Col. Inv.* 553 vs., a sixth century contract of sale, recently published by E. R. Hardy, Jr., in *Ann. de l'Inst. de Philol. et d'Hist. Orient. et Slaves* 7 (1944) 137ff. In his paper *Consensual Contracts in the Papyri?* (pp. 55-79), the undersigned denies the consensual character of papyrus contracts of lease, for work, and for services.

The second half of the issue is taken up by reports and reviews. Taubenschlag surveys literature and sources published between 1939 and 1945 (pp. 80–98; 99–120, respectively); this is supplemented by a list of European literature published during the war years and not yet available when the printing began (prepared by Berger and Taubenschlag; pp. 152–155). The book reviews refer to Taubenschlag's *Law of Greco-Roman Egypt* (Rabel), *P. Mich.* V (Berger) and VI (Taubenschlag), and A. Segrè's *Essay on the Nature of Property in the Classical World* (Taubenschlag). Special attention may be called to valuable remarks in Berger's extensive review of *P. Mich.* V.

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Academic Year 1945-1946

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Monthly Conferences:

October 25, 1945: Dr. Martin R. P. McGuire, Dean of the Graduate School of Arts and Sciences, The Catholic University of America: "The Language of Roman Law in the Light of the History of the Latin Language and Literature."

November 19, 1945: Dr. Huntington Cairns, Secretary-Treasurer and General Counsel, The National Gallery of Art, Washington, D. C.: "A Comparison of the Jurisprudence of Hobbes and Cicero."

December 17, 1945: Dr. Reginald Parker, Attorney, National Labor Relations Board, Washington, D. C.: "The Criteria of Civil Law."

January 24, 1946: Dr. Roscoe C. Dorsey, Washington College of Law: "The Roman Impress upon English Jurisprudence."

February 28, 1946: Dr. Elio Gianturco, Research Assistant, Foreign Law Section, Law Library of Congress: "Jhering's *Geist des römischen Rechts:* Genesis, Significance, Reception, Influence."

March 28, 1946: Dr. Melquiades J. Gamboa, Assistant Secretary to the President of the Philippines: "The Meeting of the Roman Law and the Common Law in the Philippines."

April 11, 1946: Dr. Miriam Theresa Rooney: "Borrowings in Roman Law and Christian Thought."

May 16, 1946: Rev. Dr. Jerome D. Hannan: "International Self-Help."

Concilium elected for the Academic Year 1946–1947:

Gaines Post, Ph.D., Assoc. Professor of Medieval History, University of Wisconsin, Madison, Wisc., *Magister.*

Brendan F. Brown, *Scriba.*

Very Rev. Robert J. White, *ex officio.*

Rt. Rev. Francesco G. Lardone, *ex officio.*

Rev. Jerome D. Hannan.

Stephan Kuttner.